This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

LEADING LAW SCHOOL TEXT BOOKS

Agency—Bays. A handbook, by Alfred W. Bays, Professor of Law, Northwestern University School of Commerce. **$1.50** net.

Agency Outlines—Mechem Outlines of Agency, by Floyd R. Mechem. Professor of Law in the University of Chicago. Second Edition. **$2.00** net.

Agency—Mechem on Agency. A treatise by Floyd R. Mechem. **$5.00** net.

American Law—Andrews' American Law. Second Edition by J. D. Andrews. 2 vols. **$12.00.**
Same, 1 vol. ed., **$5.00** net.

Bailments and Carriers—Goddard's Outlines, by E. C. Goddard, Professor of Law in the University of Michigan. **$2.50** net.

Bailments and Carriers—Van Zile, by Philip T. Van Zile, Dean Detroit College of Law. Second Ed. **$5.00.**

Bankruptcy—Bays. A handbook on Debtor, Creditor and Bankruptcy, by A. W. Bays. **$1.50** net.

Blackstone's Commentaries—Cooley. 4th Edition Commentaries on the Laws of England by William Blackstone, with a translation of all foreign words and phrases appearing in the text and very full and copious notes by Thomas M. Cooley. Fourth Edition by J. D Andrews. 2 volumes **$9.00** net.
Same, 3rd Edition **$6.00** net.

Business Law and Methods—By George L. Corlis, Dean Benton College of Law. 1 volume.

Carriers—Hutchinson. The Law of Carriers by Robert Hutchinson, Second Ed. by Floyd R. Mechem. **$4.00.**

Code Pleading—Phillips. Principles of Pleadings in Actions under the Codes of Civil Procedure by G. L. Phillips. **$4.00** net.

Commercial Law—Bays. American Commercial Law Series. 9 vols. **$12.00.** Separately per volume **$1.50.**

Commercial Law - Corlis. By George L. Corlis, Dean Benton College of Law. 1 volume.

Common Law Pleading—Andrews' Stephen's Pleadings. By Henry John Stephen. Second Edition by J. D. Andrews. **$3.50** net.

Contracts—Anson. Second American Edition, by Jerome C. Knowlton, Professor of Law in the University of Michigan. **$3.50** net.

Contracts—Bays. A handbook by A. W. Bays. **$1.50**

Contracts—Hammon. The General Principles of Contracts, by Louis L. Hammon. **$5.00** net.

Contracts—Willis. A treatise by Hugh E. Willis, Professor of Law, University of Minnesota Law School. **$3.00** net.

Corporations—Municipal - Elliott. Second Edition, by John E. Macy, Professor in Boston University Law School. **$4.00** net.

Corporations—Bays. A handbook by A. W. Bays. **$1.50**

Corporations—Marshall—[Private]. A treatise. Second Edition by William L. Marshall and William L Clark. **$5.00** net.

Corporations—Abbott—[Public]. A treatise by Howard S. Abbott. 1 volume **$4.00.**

Criminal Law—Clark & Marshall—Crimes. Second Edition by Herschell B. Lazell. **$5.00** net.

Criminal Law and Procedure Outlines—Washburn. By Emery Washburn. Third Edition by Marshall D. Ewell. **$2.50** net.

Damages—Willis. A concise treatise by Hugh E. Willis. Professor of Law, University of Minnesota. **$3.00** net.

Dictionary—Cyclopedic Law Dictionary. $5.00 net.

Dictionary—Kinney's Dictionary and Glossary. $4.00.

Domestic Relations—Peck, by Epaphroditus Peck, of the Law Dept. of Yale University.

Domestic Relations—Long. A treatise by Joseph R. Long, Prosessor of Law in Washington and Lee University. **$3 50** net.

Equity Pleading and Practice—Fletcher. Equity Pleading Practice and Forms, by William Meade Fletcher. **$5.00** net.

Equity Pleading and Practice—Van Zile, by Philip T. Van Zile. **$5.00** net.

Evidence—Hammon. A treatise, by Louis L. Hammon. **$5.00** net.

Evidence—Hughes. An illustrated treatise, by Thomas W. Hughes, Professor of Law in the University of Illinois. **$4.00** net.

Evidence—Kennedy. A practical Codification by Richard Lee Kennedy. **$2.00** net.

Evidence—Reynolds Theory of Evidence, by William Reynolds. **$2.00** net.

Evidence—Reynolds. Trial Evidence and Cross Examination, pocket edition. Limp leather **$3.50** net.

Insurance—Bays. A handbook, by Alfred W. Bays. **$1.50** net.

International Law—Bordwell's Laws of War. By W. P. Bordwell, Professor of Law, University of Missouri. **$3.50** net.

International Law—Taylor. The Origin and Growth of International Public Law, by Hannis Taylor. **$5.50** net.

Jurisprudence—Pattee. The Essential Nature of Law, by W. S. Pattee, Dean Law Department, University of Minnesota. **$2.50** net.

Legal Ethics—Warvelle. A discussion of professional conduct by George W. Warvelle. **$1.50** net.

Negotiable Instruments—Bays. A handbook, by Alfred W. Bays. **$1.50** net.

Negotiable Instruments—Bunker, by Robert E. Bunker, Professor of Law in the University of Michigan Law School. **$3.50.**

Negotiable Instruments—Ogden, by J. M. Ogden of the Indiana Law School. **$4.00.**

Negotiable Instruments—Selover. Second Edition by Wm. H. Oppenheimer. **$4.00** net.

Partnership—Bays. A handbook, by A. W. Bays. **$1.50**

Partnership—Mechem. By Floyd R. Mechem. Second edition, **$2.50** net.

Partnership—Shumaker, by Walter A. Shumaker. Second edition. **$3.00** net.

Personal Property—Childs, by Frank Hall Childs, sometime Professor of Law in Chicago Kent College of Law. [In Preparation.]

Officers—Mechem. Public Offices and Officers, by Floyd R. Mechem. **$5.00** net.

Quizzers—Walsh. Students Quiz Books. 13 numbers Paper, each **50 cents.**

Real Property—Bays. A handbook by A. W. Bays. **$1.50** net.

Real Property—Tiffany, by Herbert T. Tiffany 2 volumes. **$10.00.**
Student's edition [2 volumes in 1] **$7.00** net.

Real Property—Warvelle. Elements, by George W. Warvelle. Second edition. **$4.00** net.

Roman Law—Sandar's Justinian Institutes. First American Ed. by W. E. Hammond. **$5.00** net.

Sales—A handbook by Alfred W. Bays. **$1.50** net.

Suretyship—Spencer. A treatise on Suretyship and Guaranty, by Edward W. Spencer, Dean Milwaukee Law School.

Torts—Cooley. A new Law School Edition, by John Lewis. **$5.00** net.

Torts—Cooley's Elements, by Thomas M. Cooley. **$3.50** net.

Trusts—Pound, by Roscoe Pound, Professor of Law in Harvard University.

Wills—Rood. Including also Gifts Causa Mortis and a summary of the law of Descent, Distribution and Administration, by John R. Rood, Professor of Law University of Michigan. **$4.00** net.

CALLAGHAN & COMPANY

General Offices
401-409 E. Ohio Street

CHICAGO

Retail Store
68 W. Washington Street

STANDARD LAW SCHOOL CASE BOOKS

Administration and Government—Goodnow's Cases on Government and Administration, by Frank J. Goodnow, Eaton Professor of Administrative Law and Municipal Science in Columbia University. 1 volume **$2.50** net.

Agency—Mechem's Cases on the Law of Agency, by Floyd R. Mechem, Professor of Law in the University of Chicago. 1 volume **$3.00** net.

American Administrative Law—Goodnow's Cases on American Administrative Law Including Public Officers and Extraordinary Legal Remedies, by Frank J. Goodnow. 1 volume **$6.00** net.

Appellate Practice—Sunderland's Cases on Appellate Practice, by Edson R. Sunderland, Professor in the University of Michigan Law School. **$4.50** net.

Bailments and Carriers—Goddard's Cases on Bailments and Carriers, by Edwin C. Goddard, Professor of Law in the University of Michigan. 1 volume **$3.75** net.

Code Pleading—Hinton's Cases Code Pleading Under Modern Codes, by Edwin W. Hinton, Professor of Law, University of Missouri. 1 volume **$4.00** net.

Code Pleading—Sunderland's Cases on Code Pleading, by Edson R. Sunderland, Professor in the University of Michigan Law School. **$4.50** net.

Commercial Law—Bay's Cases on Commercial Law

Common Law Pleading—Shipp and Daish's Cases on Common Law Pleading, by E. Richard Shipp and John B. Daish. 1 volume **$2.50** net.

Common Law Pleading—Sunderland's Cases on Common Law Pleading, by Edson R. Sunderland, Professor in the University of Michigan Law School. **$4.50** net.

Conflict of Laws, Cases. See International Law.

Constitutional Law—Boyd's Cases on American Constitutional Law, by C. E. Boyd. second edition by C. E. Boyd **$3.00** net.

Criminal Law, Knowlton's Cases on Criminal Law, by Jerome C. Knowlton, Marshall Professor of Law in the University of Michigan. 1 volume **$3.00** net.

Criminal Procedure—Sunderland's Cases on Criminal Procedure, by Edson R. Sunderland, Professor of Law in the University of Michigan Law School. **$4.50** net.

Damages—Russell's Cases, by Isaac Franklin Russell, Professor of Law in New York University Law School. 1 volume **$4.00** net.

Domestic Relations—Holbrook's Cases, by Evans Holbrook, Professor of Law in the University of Michigan.

Equity Pleading and Practice—Sunderland's Cases on Equity Pleading and Practice, by Edson R. Sunderland, Professor in the University of Michigan Law School. **$4.50** net.

Equity Pleading and Practice—Thompson's Cases on Equity Pleading and Practice, by Bradley M. Thompson, Professor of Law in University of Michigan. **$3.00** net.

Evidence—Sunderland's Cases on Evidence. By Edson R. Sunderland, Professor in the University of Michigan Law School. **$4.50** net.

Extraordinary Legal Remedies—Goodnow's Cases on Officers, including Extraordinary Legal Remedies, by Frank J. Goodnow, of the Law Department of Columbia University. 1 volume **$5.00** net.

International Law—Dwyer's Cases Private International Law, second ed., by John W. Dwyer, of the Law Department, University of Michigan. **$4.00** net.

Negotiable Instruments, Bunker's Cases on Negotiable Instruments, by Robert E. Bunker, Professor of Law in the University of Michigan. 1 volume **$4.00** net.

Officers—Goodnow's Cases on the Law of Officers, including Extraordinary Legal Remedies, by Frank J. Goodnow, of the Law Department of Columbia University. 1 volume **$5.00** net.

Partnership—Mechem's Cases on Partnership, by Floyd R. Mechem. Second edition by Frank L. Sage, Professor of Law in the University of Michigan. 1 vol. **$3.50** net.

Partnership—Enlarged Edition, Mechem's Cases, same as above with addition of Supplement. 1 volume, third edition, **$4.50** net.

Procedure—Sunderland's Cases on Procedure 7 volumes **$4.50** each (in preparation).

Property—Rood's Cases on Property, Second Edition, by John R. Rood, Professor of Law in the University of Michigan. 1 volume **$3.75** net.

Suretyship—Wilson's Cases on Guaranty and Suretyship, by H. H. Wilson, of the Law Department of the University of Nebraska. 1 volume **$4.00** net.

Trial Practice—Sunderland's Cases on Trial Practice, by Edson R. Sunderland of the Law Department of the University of Michigan. **$4.50** net.

Taxation—Goodnow's Cases on Taxation, by Frank J. Goodnow of the Law Department of Columbia University. 1 volume **$5.00** net.

Wills—Bates, Cases on Wills, by Henry M. Bates, Dean of the Law Department, University of Michigan. 1 volume.

CALLAGHAN & COMPANY

General Offices
401-409 E. Ohio Street

CHICAGO

Retail Store
68 W. Washington Street

PRACTICE SERIES

SUNDERLAND'S
CASES ON PROCEDURE

Sunderland's Cases on Trial Practice.

Sunderland's Cases on Code Pleading.

Sunderland's Cases on Common Law Pleading.

Sunderland's Cases on Equity Pleading and Practice.

Sunderland's Cases on Criminal Procedure.

Sunderland's Cases on Appellate Practice.

Sunderland's Cases on Evidence.

CALLAGHAN & COMPANY
CHICAGO

CASES ON PROCEDURE

ANNOTATED

CODE PLEADING

By EDSON R. SUNDERLAND

PROFESSOR OF LAW IN THE LAW DEPARTMENT
OF THE UNIVERSITY OF MICHIGAN

CHICAGO
CALLAGHAN AND COMPANY
1913

COPYRIGHT, 1913
BY
CALLAGHAN AND COMPANY

CASES ON PROCEDURE.

The Series.

The present volume, on Code Pleading, is the second of a series of case-books which the editor hopes to prepare for the use of law students, covering the broad subject of Procedure. The plan contemplates separate volumes on the following special topics:—Trial Practice, Code Pleading, Common Law Pleading, Equity Pleading and Practice, Criminal Procedure, Evidence, and Appellate Practice.

These books are to be prepared as separate and independent treatments of the subjects to which they relate. Each branch of procedure has its own subject-matter and its independent problems, and no advantage would result from erasing the lines which mark its boundaries. But while this is so, it is nevertheless important to observe that an adequate conception of any one of these branches can be formed only by keeping constantly in mind the scope and function of procedure as a whole. In a very true and fundamental sense procedure is single and indivisible. Its aim is to furnish a mechanism for litigation, to supply a means and method for applying the law in the solution of legal controversies. One purpose runs through it all. Pleadings are drawn to present issues for trial; trials are had to determine issues raised by the pleadings. What the trial demands the pleadings must give. One is the counterpart of the other. Only in view of the trial are the pleadings intelligible; only by reference to the pleadings can the scope and course of the trial be determined. And as for the relation between procedure in *nisi prius* and in appellate courts, the former is moulded to meet the requirements of the latter and the latter is based strictly upon the foundation laid by the former. Thus pleading, in its various forms, trial practice, and appellate practice may be correctly viewed as component parts of a highly developed system designed to enable parties to successfully resort to courts of law for the redress of grievances. Together they

furnish a complete mechanism for the administration of the law.

In the present series of case-books upon procedure it is proposed to develop the subject, so far as possible, in this broad and comprehensive way. Each branch will be treated separately, and its technical details will be fully and carefully exhibited, but at the same time it will be the definite aim to make each volume disclose its place and purpose as an integral part of an articulated system. In this way, if at all, may procedure be shown in its true character, as a logically developed and practically efficient means for accomplishing a very important end, instead of a mass of arbitrary and technical rules. No method will work well in the hands of those who lack an adequate perspective and who fail to take a comprehensive view of its scope and purpose. If the law schools are to turn out men able to meet the exacting demands of a critical and sorely-tried public, they must spare no effort to develop in their students a thorough, rational and enlightened appreciation of the true function and the basic principles of procedure. The series here proposed is an effort to supply material to meet this need.

EDSON R. SUNDERLAND.

University of Michigan.

PREFACE

In the present volume on Code Pleading, the editor has aimed to present the subject, in all of its more important features, as a complete working system of pleading. The code has frequently been treated as the mere "antithesis" of common law pleading, and this has resulted in throwing the subject completely out of balance by unreasonably extending the discussion of those elements which are "characteristic" of the code, while unduly restricting or entirely ignoring those principles which the code shares with the common law. Such a method of treatment is appropriate for a purely critical and historical study of the code, but it does not seem adequate for a study which aims to analyze the code system as a well rounded body of principles suited to the accurate and convenient presentation of legal controversies.

The student should be able to obtain a clear conception of the system as a currently used method of procedure, adapted to the complex demands of modern litigation. He should understand both the theory upon which it is based and the practice which has developed in its use. This requires an analytical study of the code in all its important aspects and a synthetic appreciation of the true function of each part in producing a completely developed method.

A true historical perspective is of course essential to a successful study of any subject, and it is believed that this has been sufficiently exhibited in connection with the examination of the various problems of pleading, but it has been purposely made incidental rather than primary.

Annotations have been freely made for the purpose not only of disclosing divergent views and amplifying the matter under discussion, but of furnishing a convenient body of references to the more important decisions in the various code states.

The editor has also gathered up and presented in an accessible form the exact statutory provisions found in all the codes upon the principal branches of the subject as an aid to the student in making a close study of the procedure in the particular jurisdiction in which he may be interested, and to serve as a basis for the comparison of cases from different states.

That there is more litigation over questions of pleading in the code states than in those adhering to the common law, is evident from an inspection and comparison of the current reports. This is due partly to the comparative newness of the code and partly to its inherent difficulties, notwithstanding that the system was expected by its founders and generally believed by its adherents to be particularly free from technicalities. The notion of simplicity which tradition has associated with the code has tended to disarm the student and to discourage the close and painstaking study which was always conceded to be necessary for an adequate comprehension of the older systems of pleading. The editor has endeavored in this book to treat the code as it is actually employed, to disclose both the logic of its theory and the difficulties of its practice, for the purpose of giving the student a thorough and intimate understanding of code pleading as both a science and an art.

EDSON R. SUNDERLAND.

University of Michigan,
Ann Arbor.
January, 1913.

Table of Contents

INTRODUCTION.

Section		Page
1.	MEANING OF TERM "CODE PLEADING"	1
2.	OCCASION FOR DEVELOPMENT OF THE CODE	4
3.	RELATION OF CODE PLEADING TO COMMON LAW AND EQUITY PLEADING	7
4.	ABOLITION OF THE DISTINCTION BETWEEN ACTIONS AT LAW AND SUITS IN EQUITY	15

CHAPTER I.

PARTIES.

1. IN WHOSE NAME ACTION TO BE PROSECUTED.

(a) *Real Party in Interest.*

Stewart v. Price (1902) 64 Kan. 191 25
Manley v. Park (1904) 68 Kan. 400 36
Swift & Co. v. Wabash Rd. Co. (1910) 149 Mo. App. 526.... 37
Greene v. McAuley (1905) 70 Kan. 601 42
Jefferson v. Asch (1893) 53 Minn. 446 50
Enos v. Sanger (1897) 96 Wis. 150 56
Giselman v. Starr (1895) 106 Cal. 651 59

(b) *Trustee of an Express Trust.*

Considerant v. Brisbane (1860) 22 N. Y. 389..... 61
Mitchell v. St. Mary (1897) 148 Ind. 111..... 69
People's Oil & Fertilizer Co. v. Charleston & Western Carolina Ry. Co. (1909) 83 S. C. 530 71
Cousar v. Heath, Witherspoon & Co. (1908) 80 S. C. 466.... 74

(c) *Person Expressly Authorised by Statute.*

Oates v. Union Pacific Ry. Co. (1891) 104 Mo. 514 76
Milwaukee v. U. S. Fidelity & Guaranty Co. (1911) 144 Wis. 603 78

2. JOINDER OF PLAINTIFFS.

(a) *When Suing for Themselves.*

Gray v. Rothchild (1888) 48 Hun (N. Y.) 596 79
McIntosh v. Zaring (1897) 150 Ind. 301 84
George v. Benjamin (1898) 100 Wis. 622..... 90
Schiffer v. City of Eau Claire (1881) 51 Wis. 385..... 94
First Nat. Bank v. Hummel (1890) 14 Colo. 259 99

(b) *When Suing as Representatives of a Class.*

McKenzie v. L'Amoureux (1851) 11 Barb. (N. Y.) 516..... 101
Tobin v. Portland Mills (1902) 41 Ore. 269 104

3. JOINDER OF DEFENDANTS.

(a) *In Contract Actions.*

Sundberg v. Goar (1904) 92 Minn. 143 112

Section Page
Cox v. Maddux (1880) 72 Ind. 206 113
Loustalot v. Calkins (1898) 120 Cal. 688 115

(b) *In Tort Actions.*
Turner v. Hitchcock (1866) 20 Iowa, 310 116
Millard v. Miller (1907) 39 Colo. 103 117
Fortmeyer v. Nat. Biscuit Co. (1911) 116 Minn. 158 120

(c) *In Equitable Actions.*
Leyden v. Owen (1910) 150 Mo. App. 102 122
Castle v. Madison (1902) 113 Wis. 346 132
Disbrow v. Creamery Package Mfg. Co. (1908) 104 Minn. 17.. 139

4. BRINGING IN NEW PARTIES.
(a) *When Necessary for Complete Determination of Suit.*
Steinbach v. Prudential Ins. Co. (1902) 172 N. Y. 471..... 143
Clay County Land Co. v. Alcox (1902) 88 Minn. 4..... 148

(b) *Intervention.*
Taylor v. Adair (1867) 22 Iowa, 279..... 151
Smith v. City of St. Paul (1896) 65 Minn. 295 155

(c) *Interpleader.*
Hartford Life & Annuity Ins. Co. v. Cummings (1897) 50 Neb. 236 157
First Nat. Bank of Cadiz v. Beebe (1900) 62 Ohio St. 41 163

CHAPTER II.

SPLITTING A CAUSE OF ACTION.

Secor v. Sturgis (1858) 16 N. Y. 548 166
Reilly v. Sicilian Asphalt Paving Co. (1902) 170 N. Y. 40 174
Payne v. New York, Susquehanna & Western Rd. Co. (1911) 201 N. Y. 436..... 178
Hahl v. Sugo (1901) 169 N. Y. 109 186

CHAPTER III.

JOINDER OF CAUSES OF ACTION.

1. MUST ALL BELONG TO SAME CLASS.
Thelin v. Stewart (1893) 100 Cal. 372 192
Hawk v. Thorn (1869) 54 Barb. (N. Y.) 164 198
McArthur v. Moffett (1910) 143 Wis. 564..... 199

2. EACH MUST AFFECT ALL THE PARTIES.
(a) *In General.*
Kruschke v. Quatsoe (1910) 49 Colo. 312 216
Nahte v. Hansen (1908) 106 Minn. 365 218

(b) *Must Affect All in Same Capacity.*
Merrill v. Suffa (1908) 42 Colo. 195 220

(c) *Need not Affect Them all Equally.*
Fegelson v. Niagara Fire Ins. Co. (1905) 94 Minn. 486..... 224

3. MUST NOT REQUIRE DIFFERENT PLACES OF TRIAL.
Wilson v. Louisville & Nashville Rd. Co. (1908) (Ky.) 112 S. W. 585 227

Section Page
4. Each Must Be Separately Stated.
Hall v. Cudahy (1909) 46 Colo. 324 230
Murray v. City of Butte (1906) 35 Mont. 161 233

5. Stating Same Cause of Action in Different Forms.
Harvey v. Southern Pacific Co. (1905) 46 Ore. 505 236
Astin v. Chicago, Milwaukee & St. Paul Ry. Co. (1910) 143 Wis. 477 239

CHAPTER IV.

THE COMPLAINT OR PETITION.

1. Facts Constituting a Cause of Action.
Box v. Chicago, Rock Island & Pacific Ry. Co. (1899) 107 Iowa, 660 247

2. Certainty, Definiteness and Particularity.
(a) *In Contract Cases.*
Weeks v. O'Brien (1894) 141 N. Y. 199 253
Southern Indiana Loan & Savings Institution v. Roberts (1908) 42 Ind. App. 653 254
Moody v. Ins. Co. (1894) 52 Ohio St. 12 257
Lent v. New York & Massachusetts Ry. Co. (1892) 130 N. Y. 504 260
Bowen v. Emmerson (1869) 3 Ore. 452 264
Conrad Nat. Bank v. Great Nor. Ry. Co. (1900) 24 Mont. 178 266
Minor v. Baldridge (1898) 123 Cal. 187 267

(b) *In Tort Cases.*
Chicago & Erie Rd. Co. v. Lain (1908)170 Ind. 84 270
Fuller v. Ill. Cent. Rd. Co. (1910) 138 Ky. 42 276
City of Logansport v. Kihm (1902) 159 Ind. 68 278
Colorado Springs Co. v. Wight (1908) 44 Colo. 179 281
Wendling Lumber Co. v. Glenwood Lumber Co. (1908) 153 Cal. 411 284
Paine v. British-Butte Min. Co. (1910) 41 Mont. 28 287

(c) *In Equity Cases.*
Brown v. Rea (1907) 150 Cal. 171 291
Smith v. Smith (1897) 50 S. C. 54 296

3. Allegations on Information and Belief.
State ex rel. v. Cooley (1894) 58 Minn. 514 303

4. Pleading According to Legal Effect.
Helena Nat. Bank v. Rocky Mountain Teleg. Co. (1897) 20 Mont. 379 306
Joseph v. Holt (1869) 37 Cal. 250 308
Kidder v. Port Henry Iron Ore Co. (1911) 201 N. Y. 445 309

5. Legal Conclusions.
State ex. Rel. v. Malheur County Court (1909) 54 Ore. 255 312
Vachon v. Nichols-Chisholm Lumber Co. (1910) 111 Minn. 45 313
People v. Beach (1911) 49 Colo. 516 314
Long v. Dufur (1911) 58 Ore. 162 318
Lassiter v. Roper (1894) 114 N. C. 17 319

6. Evidence.
McCaughey v. Schuette (1897) 117 Cal. 228 323
Nichols v. Nichols (1896) 134 Mo. 187 325

Section Page

7. Pleading by Way of Recital, in the Alternative and Hypothetically.
Thompson v. Read (1909) 63 Misc. (N. Y.) 235 327
Malott v. Sample (1904) 164 Ind. 645 328
Anderson v. Minneapolis, St. P. & S. Ste. M. Ry. Co. (1908) 103 Minn. 224 332
Hasberg v. Moses (1903) 81 N. Y. App. Div. 199 334
Emison v. Owyhee Ditch Co. (1900) 37 Ore. 577 337

8. Anticipating Defenses.
Western Union Tel. Co. v. Henley (1901) 157 Ind. 90 338
Royal Ins. Co. v. Schwing (1888) 87 Ky. 410 339
A. L. Clark Lumber Co. v. Johns (1911) 98 Ark. 211 341

9. Special Damages.
Fledderman v. St. Louis Transit Co. (1908) 134 Mo. App. 199 343

10. Prayer for Relief.
Smith v. Smith (1903) 67 Kan. 841 347
Rush v. Brown (1890) 101 Mo. 586 348

11. Exhibits.
Cave v. Gill (1900) 59 S. C. 256 351
Stephens v. Am. Fire Ins. Co. (1896) 14 Utah, 265 353

CHAPTER V.

THE ANSWER.

1. General Principles.
Strook Plush Co. v. Talcott (1908) 129 N. Y. App. Div. 14 356
Jones v. City of Caldwell (1911) 20 Idaho, 5 368
Browning, King & Co. v. Terwilliger (1911) 144 N. Y. App. Div. 516 369

2. Denials.
(a) *Form.*
Peters v. McPherson (1911) 62 Wash. 496 371
Prunty v. Consolidated Fuel & Light Co. (1910) 82 Kan. 541 .. 377
Cooper v. Am. Cent. Ins. Co. (1909) 139 Mo. App. 570 378
Leary v. Moran (1886) 106 Ind. 560 380
Curnow v. Phoenix Ins. Co. (1895) 46 S. C. 79 382
Grimm v. Town of Washburn (1898) 100 Wis. 229 384

(b) *Denials of Knowledge or Information.*
Church v. Hendrie (1910) 47 Colo. 544 385
Welles v. Colo. Nat. Life Assur. Co. (1911) 49 Colo. 508 387
Smith v. Allen (1901) 63 Neb. 74 388

(c) *Issues Raised by Denials.*
Baxter v. St. Louis Transit Co. (1906) 198 Mo. 1 390
Wiedeman v. Hedges (1901) 63 Neb. 103 394
Wilson v. Charleston & Savannah Ry. (1897) 51 S. C. 79 395
Duff v. Willamette Steel Works (1904) 45 Ore. 479 399
Multnomah County v. Willamette Towing Co. (1907) 49 Ore. 204 402
Jones v. El Reno Mill & Elevator Co. (1910) 26 Okla. 796 405
Barker v. Wheeler (1901) 62 Neb. 150 407
Sorenson v. Townsend (1906) 77 Neb. 499 409
Bean v. Lamprey (1901) 82 Minn. 320 410
Crane v. Powell (1893) 139 N. Y. 379 411
Griffith v. Wright (1899) 21 Wash. 494 414

Section Page

3. AFFIRMATIVE DEFENSES.
Jacoby v. James (1910) 136 N. Y. App. Div. 431 416
Cincinnati Traction Co. v. Forrest (1905) 73 Ohio St. 1..... 417
Ramp v. Metropolitan St. Ry. Co. (1908) 133 Mo. App. 700.... 419
Libby v. St. Louis, Iron Mt. & So. Ry. Co. (1909) 137 Mo. App. 276 420
State Savings Bank v. Albertson (1909) 39 Mont. 414..... 423
Penn. Mut. Life Ins. Co. v. Ornauer (1907) 39 Colo. 498.... 425
Columbia Nat. Bank v. Western Iron & Steel Co. (1896) 14 Wash. 162..... 427
Vallancey v. Hunt (1910) 20 N. D. 579..... 429
Thompson v. Halbert (1888) 109 N. Y. 329 432

4. INCONSISTENT DEFENSES.
Banta v. Siller (1898) 121 Cal. 414 436
Seattle Nat. Bank v. Carter (1895) 13 Wash. 281..... 438
Loveland v. Jenkins-Boys Co. (1908) 49 Wash. 369..... 442
Jones v. Whitaker (1911) 141 Ky. 484 445
Caruso v. Brown (1911) 142 Ky. 76 448
Hart-Parr Co. v. Keeth (1911) 62 Wash. 464 450
Steenerson v. Waterbury (1893) 52 Minn. 211 454

5. ANSWERS IN ABATEMENT.
Needham v. Wright (1895) 140 Ind. 190 455
Callahan Co. v. Wall Rice Milling Co. (1909) 44 Ind. App. 372 457
McKim v. District Court (1910) 33 Nev. 44 459

6. COUNTERCLAIMS.
(a) *General Nature.*
General Electric Co. v. Williams (1898) 123 N. C. 51..... 461
State v. Arkansas Brick & Mfg. Co. (1911) 98 Ark. 125..... 463
Walker v. Am. Cent. Ins. Co. (1894) 143 N. Y. 167..... 466
Shelton v. Conant (1894) 10 Wash. 193 469
Stoner v. Swift (1904) 164 Ind. 652 470
Nat. Fire Ins. Co. v. McKay (1860) 21 N. Y. 191..... 473

(b) *How Pleaded.*
Babcock v. Maxwell (1898) 21 Mont. 507 476

(c) *Kinds of Counterclaims.*
(1) Arising out of the Same Transaction.
Adams v. Schwartz (1910) 137 N. Y. App. Div. 230 478

(2) Connected with the Subject of the Action.
Wild Rice Lumber Co. v. Benson (1911) 114 Minn. 92..... 487

(3) In an Action on Contract, any Other on Contract.
Jansen v. Dolan (1911) 157 Mo. App. 32 490
Rooker v. Bruce (1909) 45 Ind. App. 57 493

(d) *Parties to Counterclaims.*
Weeks v. O'Brien (1898) 25 N. Y. App. Div. 206 494
Pope Mfg. Co. v. Charleston Cycle Co. (1898) 55 S. C. 528.... 496

(e) *Jurisdictional Amount.*
General Electric Co. v. Williams (1898) 123 N. C. 51..... 498
Howard Iron Works v. Buffalo Elevating Co. (1903) 176 N. Y. 1 500

(f) *Existence at Commencement of Action.*
Smith v. French (1906) 141 N. C. 1..... 505

(g) *Election between Counterclaim and Independent Action.*
Jones v. Witousek & Co. (1901) 114 Iowa, 14..... 508

Section Page
(h) *Effect of Assignment on Right to Counterclaim.*
Stadler v. First Nat. Bank of Helena (1898) 22 Mont. 190.... 511
St. Louis Nat. Bank v. Gay (1894) 101 Cal. 286..... 521

(i) *Equitable Set-Off.*
Pendleton v. Beyer (1896) 94 Wis. 31 526

(j) *Claims against Co-defendants.*
Kollock v. Scribner (1897) 98 Wis. 104..... 529

7. EQUITABLE DEFENSES.
East v. Peden (1886) 108 Ind. 92 537
Dewey v. Hoag (1853) 15 Barb. (N. Y.) 365..... 541

CHAPTER VI.

THE DEMURRER.

1. GENERAL PRINCIPLES.
Hanson v. Neal (1908) 215 Mo. 256 543
Minnich v. Packard (1908) 42 Ind. App. 371..... 546
Helm & Son v. Briley (1906) 17 Okla. 314 548
Henderson v. John (1889) 13 Colo. 280 549
McCall Co. v. Stone (1905) 124 Wis. 572 551
Fidelity & Deposit Co. v. Parkinson (1903) 68 Neb. 319..... 552
Sprunt v. Gordon (1911) 89 S. C. 426 553
Jeffries v. Fraternal Bankers' Reserve Society (1907) 135 Iowa, 284 556

2. INSUFFICIENT FACTS.
(a) *Purpose of General Demurrer.*
Hall v. Bell (1910) 143 Wis. 296..... 559

(b) *What the Demurrer Admits.*
Downey v. Colo. Fuel & Iron Co. (1910) 48 Colo. 27 560
Rice v. Rice (1886) 13 Ore. 337 561
Heaton v. Packer (1909) 131 N. Y. App. Div. 812 565
Mallinckrodt Chemical Works v. Nemnich (1902) 169 Mo. 388.. 566
Sprague v. New York & N. E. Rd. Co. (1896) 68 Conn. 345.... 570

(c) *Searching the Record.*
Baxter v. McDonnell (1897) 154 N. Y. 432 571
Callahan v. Louisville Dry Goods Co. (1910) 140 Ky. 712..... 572
Baldwin v. City of Aberdeen (1909) 23 S. D. 636 574
Fulton County Gas & Elec. Co. v. Hudson River Teleph. Co. (1911) 200 N. Y. 287 577

(d) *Issues Raised by Demurrer.*
Toner v. Wagner (1901) 158 Ind. 447 579
Mueller v. Light (1909) 92 Ark. 522..... 581
Calif. Safe Dep. & Trust Co. v. Sierra Valleys Ry. Co. (1910) 158 Cal. 690 582
Fitger Brewing Co. v. Am. Bonding Co. (1911) 115 Minn. 78.. 584
Kleinclaus v. Dutard (1905) 147 Cal. 245..... 585
Seamans v. Barentsen (1905) 180 N. Y. 333..... 586
Sinker v. Floyd (1885) 104 Ind. 291..... 588

(e) *Effect of Failure to Demur.*
East St. Louis Ice Co. v. Kuhlmann (1911) 238 Mo. 685..... 589

3. WANT OF JURISDICTION.
Belden v. Wilkinson (1899) 44 N. Y. App. Div. 420..... 591
Peterson v. Pantheon Lumber Co. (1911) 62 Wash. 189..... 593

Section Page

4. WANT OF LEGAL CAPACITY TO SUE.
Coddington v. Canaday (1901) 157 Ind. 243..... 595
Los Angeles Ry Co. v. Davis (1905) 146 Cal. 179..... 597
Page Woven Wire Fence Co. v. Joslin (1906) 38 Colo. 162.... 601

5. ANOTHER ACTION PENDING.
Wetzstein v. Boston & Mont. Consol. Copper etc., Co. (1903) 28 Mont. 451..... 602

6. DEFECT AND MISJOINDER OF PARTIES.
Kucera v. Kucera (1893) 86 Wis. 416..... 607
Gardner v. Samuels (1897) 116 Cal. 84..... 610
Weber v. Dillon (1898) 7 Okla. 568..... 612
Jaeger v. Sunde (1897) 70 Minn. 356..... 614
Randall v. Johnstone (1910) 20 N. D. 493..... 615

7. MISJOINDER OF CAUSES OF ACTION.
Kurtz v. Ogden Canyon Sanitarium Co. (1910) 37 Utah, 313... 617
Howe v. Coates (1903) 90 Minn. 508..... 618

8. JOINT DEMURRERS.
Frederick v. Koons (1907) 40 Ind. App. 421..... 620
Carver v. Carver (1884) 97 Ind. 497..... 621

CHAPTER VII.

THE REPLY.

1. WHEN REQUIRED.
Rand v. Butte Elec. Ry Co. (1909) 40 Mont. 398..... 624
St. Louis, I. M. & So. Ry. Co. v. Higgins (1884) 44 Ark. 293.. 627
Stenson v. Elfmann (1910) 26 S. D. 134..... 628
Tate v. Rose (1909) 35 Utah, 229..... 629
Sterling v. Smith (1893) 97 Cal. 343..... 633

2. DEPARTURE.
Hill Brick & Tile Co. v. Gibson (1908) 43 Colo. 104..... 636
Spiess' Adm'x v. Bartley (1908) 130 Ky, 277..... 637
Johnson v. State Bank of Seneca (1898) 59 Kan. 250..... 639
Brown v. Baker (1901) 39 Ore. 66..... 640
St. Paul Fire & Marine Ins. Co. v. Mountain Park Stock Farm Co. (1909) 23 Okla. 79..... 642

3. COUNTERCLAIM IN REPLY.
Beakey v. Vander Meerschen (1908) 78 Kan. 538..... 645

4. WAIVER OF REPLY.
Merchants' Nat. Bank v. Barlow (1900) 79 Minn. 234..... 647

CHAPTER VIII.

MOTIONS

1. IN GENERAL.
Wallace v. Lewis (1890) 9 Mont. 399..... 650

2. MOTION TO STRIKE.
Tittle v. Kennedy (1904) 71 S. C. 1..... 655
Ewing v. Vernon County (1908) 216 Mo. 681..... 656
Blemel v. Shattuck (1892) 133 Ind. 498..... 657
Swank v. Elwert (1910) 55 Ore. 487..... 659

Section Page
Cate v. Gilman (1875) 41 Iowa, 530 660
Town of Waukon v. Strouse (1888) 74 Iowa, 547..... 662
Upton v. Kennedy (1893) 36 Neb. 66..... 662
First Nat. Bank v. Lang (1905) 94 Minn. 261..... 664
Hayward v. Goldsbury (1884) 63 Iowa 436..... 667
Fritz v. Barnes (1877) 6 Neb. 435..... 667

3. MOTION TO MAKE MORE DEFINITE AND CERTAIN.
Casey v. Dorr (1910) 94 Ark. 433..... 668
Grimes v. Cullison (1895) 3 Okla. 268..... 669
Blair v. Wilkeson Coal & Coke Co. (1909) 54 Wash. 334..... 670
Cornell v. Haight (1910) 87 Neb. 508..... 671
Commonwealth Co. v. Nunn (1902) 17 Colo. App. 117..... 672
Pugh v. Winona & St. Peter Rd. Co. (1882) 29 Minn. 390.... 674

4. MOTION TO ELECT.
Darknell v. Coeur D'Alene & St. Joe Transp. Co. (1910) 18 Idaho 61 676

5. MOTION FOR JUDGMENT ON THE PLEADINGS.
Le Breton v. Stanley Contracting Co. (1911) 15 Cal. App. 429 677
Thomas v. Ray (1910) 48 Colo. 423..... 680

6. RENEWAL OF MOTION.
Rice v. Van Why (1910) 49 Colo. 7..... 682

CHAPTER IX.

BILLS OF PARTICULARS.

Tilton v. Beecher (1874) 59 N. Y. 176..... 685
Board of Commissioners v. Am. Loan & Trust Co. (1899) 75 Minn. 489 689
Dudley v. Duval (1902) 29 Wash. 528..... 690

CHAPTER X.

AMENDMENT AND AIDER.

1. APPLICATION FOR AMENDMENT.
Stewart v. Winner (1905) 71 Kan. 448..... 693
Pratt, Hurst & Co. v. Tailer (1904) 99 N. Y. App. Div. 236.... 695
Abbott v. Meinken (1900) 48 N. Y. Div. 109..... 696

2. DILIGENCE OF PARTY SEEKING AMENDMENT.
Paulsen v. Modern Woodmen (1911) 21 N. D. 235..... 698
Heiden v. Atlantic Coast Line R. R. Co. (1909) 84 S. C. 117.. 699
Home Ins. Co. v. Overturf (1904) 35 Ind. App. 361..... 701

3. SHOWING OF PREJUDICE BY PARTY OPPOSING AMENDMENT.
Bowers v. Good (1909) 52 Wash. 384..... 704

4. CHARACTER OF AMENDMENT ALLOWED.
(a) *Before Trial.*
Brown v. Leigh (1872) 49 N. Y. 78..... 705

(b) *At the Trial.*
Gates v. Paul (1903) 117 Wis. 179..... 708
Scroggin v. Johnstone (1895) 45 Neb. 714..... 714
Thomas v. Hatch (1881) 53 Wis. 296..... 715
Guidery v. Green (1892) 95 Cal. 630..... 716
Flaherty v. Butte Elec. Ry. Co. (1911) 43 Mont. 141..... 718

Section Page

(e) *In Relation to the Statute of Limitations.*
Clark v. Oregon Short Line R. R. Co. (1908) 38 Mont. 177.... 721
Kansas City v. Hart (1899) 60 Kan. 684..... 727
Culp v. Steere (1892) 47 Kan. 746..... 732

(d) *Distinction between Complaint and Answer.*
Cartwright v. Ruffin (1908) 43 Colo. 377..... 735

5. RELATION OF AMENDED PLEADING TO ORIGINAL.
Raymond v. Toledo, St. L. & K. C. R. R. Co. (1897) 57 Ohio St. 271 737
Murphy v. Plankinton Bank (1904) 18 S. D. 317..... 739
Bush v. Pioneer Mining Co. (1910) 102 C. C. A. 372..... 741

6. AIDER BY SUBSEQUENT PLEADING.
Lux & Talbot Stone Co. v. Donaldson (1903) 162 Ind. 481.... 744
Whitley v. Southern Ry. Co. (1896) 119 N. C. 724..... 746

CHAPTER XI.

CONSTRUCTION OF PLEADINGS.

Sage v. Culver (1895) 147 N. Y. 241..... 748
Witham v. Blood (1904) 124 Iowa 695..... 748
Patterson v. Patterson (1902) 40 Ore. 560..... 750
Nat. Fire Ins. Co. v. Eastern Bldg. & Loan Assn. (1902) 63 Neb. 698 754
Treanor v. Houghton (1894) 103 Cal. 53..... 754

CODE PLEADING

INTRODUCTION

SECTION 1. MEANING OF THE TERM "CODE PLEADING."

Code Pleading is a term which has come into general use to signify a certain system of pleading which was devised and given legal effect in the state of New York about the middle of the nineteenth century, and which has since been adopted, with more or less modification, by the legislatures of nearly thirty other states and the territory of Alaska.

The foundation of the system was the New York Code of Civil Procedure of 1848. In that act of the legislature of New York the main features of code pleading, as the term has since been employed, were clearly set forth, and that code served not only as the groundwork for future legislation in New York upon the subject of procedure, but as a model for similar legislation in other states. Although this original code was almost immediately amended in New York, and has, down to the present time, been subject to constant change and innumerable modifications at the hands of the legislature, its essential characteristics, so far as it relates to pleading, have nevertheless persisted. The modern New York Code of Civil Procedure is a detailed and elaborate code of both pleading and practice, but the portion of this code dealing with pleading is largely the old Code of 1848, with comparatively few changes of a radical kind; so that the many decisions of the New York courts, which during more than half a century, have interpreted and given form to the principles of code pleading, continue to be a vital and comprehensive exposition of the current system of procedure under the code.

In other states many details of the original New York code were either never adopted or were subsequently altered, and, indeed, in every state the legislature has found the code of procedure a favorite field for its ceaseless activities. But the changes have rarely affected funda-

mental principles. That these basic elements have come unscathed through such a sea of legislative turmoil speaks much for their inherent strength and vitality. Each separate state has its own code, and countless discrepancies and differences exist among them, but at bottom they all aim to do much the same thing in much the same way.

The term "code" is used in both a broad and a narrow sense in current American statutes. Broadly, it is any compilation, in systematic form, of the laws affecting a given subject matter. Many states have codified all their laws, and issued a so-called "code," which purports merely to embrace, in organized and systematic form, the outstanding and unrepealed legislation of the state. Such a code may include the subject of procedure, and indeed always does so, since there is no state where the legislature has wholly refrained from the statutory regulation of that branch of the law. But these "codes" have nothing to do with "code pleading." The Code of Alabama is a code only in this broad sense, for that state is still substantially under the common law procedure. The same is true of Tennessee, Georgia, and Virginia. Their codes are only codified laws, and the term refers entirely to their form and not at all to the substance of the compilation.

But in a narrower sense, as used in pleading, the "code" is a particular statute or group of statutes, affecting the subject of pleading, copied from or modified after the New York Code of Civil Procedure of 1848. The "code" in this sense means the "New York Code of Procedure" in its original or modified form.

Of course no other state has enacted, in all its details, the New York Code of 1848 nor any subsequent form of that code as fashioned by the legislature of New York, so that it sometimes becomes a difficult question, how widely statutes relating to pleading may vary from the New York original and yet constitute a "code" in this specific sense. An analysis of doubtful cases for the purpose of classification would serve no useful purpose here. A large number of states so clearly belong in the "code" class that no serious question could arise concerning them. These are Alaska, Arizona, Arkansas, California, Colorado, Idaho, Indian Territory, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico,

New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Washington, Wisconsin, and Wyoming. Others have some of the characteristic features of the "code," but not enough to clearly constitute them "code states."

Code pleading relates to the principles involved in all these codes of procedure. "The code," as the term is used in pleading, is not the New York Code of 1848, nor any subsequent New York code, nor is it the code of any particular state. "The code" is the generic aspect of the individual codes. It cannot be reduced to specific and precise language, for the language of the different codes often differs. One may quote from the New York Code or from the Ohio Code or from the California Code upon a certain point, and each may differ from the rest. Which is the true "code?" Perhaps none, in language, but perhaps all in substance. "The code" is a sort of composite ideal, derived from all, but completely embodied in none. It consists in principles, not words. Sometimes the phraseology is almost identical in all the codes; sometimes it is quite different. But underneath the diverse language and independent of the identical phrases, common principles run through these various codes, and it is these which constitute "the code" which the pleader must study. It cannot be denied that differences in wording cause many differences in decisions, and many cases arising under one code may be inapplicable under another. Such discrepancies and inconsistencies are, however, only incidental, and they lie on the surface of the subject. They tend to confuse the student of "the code" by causing cases to turn upon immaterial variations. But if one will look beyond the particular to the general, and will clearly distinguish between that which is contingent and that which is essential; if one will differentiate the principle itself from the form of its concrete manifestation; in short, if one will view "the code" broadly as a method designed to correct certain abuses and to produce certain desirable results in pleading, and will consider each particular code as merely an individualized instance of that method;—if one will do this, the diversities will lose their power to confuse, and it will be possible to see in "the code" a well-defined and articulated system susceptible of close analysis.

A study of "the code" in this broad and generic sense is, indeed, essential to an adequate understanding of every particular code. Only by a comparison of different individual codes can those features which are accidental be distinguished from those which are fundamental to the system. The decisions themselves show how invaluable such comparisons are, for the courts of the various code states constantly refer to cases involving the interpretation of similar provisions of other codes. Each jurisdiction has developed its own precedents in pleading, but this development has taken place in the light of the experience of other jurisdictions. There is thus a unity running through the cases which forms a substantial basis, and constitutes a sufficient reason, for treating code pleading as a congeries of definite principles of wide application.

SECTION 2. THE OCCASION FOR THE DEVELOPMENT OF THE CODE.

The true meaning and scope of any reform may often be profitably investigated through a study of the causes which brought it into being. Code pleading was distinctly and confessedly a protest against the technicalities of common law pleading. So far, therefore, as one understands what those technicalities were, will he know what code pleading was intended to be.

At the time when the code was devised, common law pleading had already gone through a considerable process of intelligent reform in England, but in this country much less had been done. The system of procedure which America inherited from England was adopted as of the date of the political separation in 1776. At that time the two nations parted company, and thereafter such changes as took place in the laws of England were without direct effect upon the jurisprudence of this country. For three-quarters of a century after the declaration of political independence, the states of America were too busily concerned with financial, social and industrial problems to permit of any great activity in the direction of reforming legal procedure. The system taken from England served well enough, and the people manifested little inclination to take up the burden of revision. In England, however, a vigorous agitation began about 1828, and a number of parlia-

mentary commissions were appointed to investigate the law of procedure and to suggest appropriate remedies for such abuses as should be found to exist. As a result, parliament passed an act in 1833, 3 and 4 Will. IV, Cap. 42, which provided that "the judges of the said superior courts, or any eight or more of them, of whom the chiefs of each of the said courts shall be three, shall and may, by any rule or order to be from time to time by them made, in term or vacation, at any time within five years from the time when this act shall take effect, make such alterations in the mode of pleading in the said courts, and in the mode of entering and transcribing pleadings, judgments and other proceedings in actions at law and such regulations as to the payment of costs, and otherwise for carrying into effect the said alterations, as to them shall seem expedient."

Pursuant to the authority so conferred by parliament, the judges of the superior courts promulgated a set of rules at the Hilary term, 1833, embodying a considerable number of substantial changes in the common law system of pleading. These rules elaborately set forth the cases when it was proper and when improper to employ several counts in the same declaration, and when several pleas might or might not be used; they abolished technicalities in respect to the commencement and conclusion of pleas; they provided a simple form for the demurrer and joinder in demurrer; they specified and limited the scope of the general issues in the different forms of action; and in other respects they sought to mitigate the rigors of the technical rules of pleading. Later, in Trinity term, in the first year of the reign of Queen Victoria, some changes were made in these rules and a few new provisions added.

The reform thus accomplished was not sufficiently thoroughgoing to satisfy the public demand for simplicity in pleading, and it served merely to pave the way for the far more radical reforms of the Judicature Act of 1873.

The agitation which resulted in the rules of Hilary term doubtless exercised a two-fold influence upon public sentiment in this country. It called attention to the need for reform in pleading and it demonstrated the insufficiency of the changes introduced by those rules. They were never adopted in this country, but it became increasingly clear that the technicalities of common law pleading were growing obnoxious to litigants. The apparent failure of the

English efforts at reform encouraged radical suggestions, and a strong sentiment developed in this country toward the total abolition of the whole common law system and the substitution of a new system better adapted to modern needs and modern conditions. The objections made to the common law system of pleading were numerous, but the more important were the following:

1. It involved an arbitrary and useless distinction between actions at law and suits in equity.
2. The forms of action, such as trespass, trover and assumpsit, were mere surviving remnants of an outgrown system of writs, and the rules which defined their scope and character were utterly technical and useless.
3. The rules as to parties were crude and inequitable.
4. The formal, elaborate and bewildering language of the pleadings tended to obscure rather than to disclose the issues.
5. The technical distinctions between the different kinds of pleas, and the formal requirements in regard to them, were extremely burdensome and frequently resulted in a miscarriage of justice.
6. Limitations upon the right to join different causes of action in the same declaration, and restrictions upon the right to off-set demands, multiplied litigation without any compensating advantage.
7. The strict rule of construction applied to pleadings encouraged technical objections, and often obscured the merits of causes.
8. The system was productive of confusion through the common use of fictions and untrue allegations.
9. By means of the broad general issues defendants were enabled to conceal their real defenses.
10. Amendments to pleadings were not permitted with sufficient liberality.

Whether or not all of these objections were well taken, it is perhaps not important to determine. The system of code pleading was proposed and adopted to meet these and other similar faults which were deemed to exist in the common law system. It was adopted as a substitute for the older system, and not as an amendment of it. It purported to establish a system complete in itself. How far it suceeeded will perhaps appear in the course of the study about to be made.

SECTION 3. THE RELATION OF CODE PLEADING TO COMMON LAW AND EQUITY PLEADING.

It is clear from the wording of the codes, that the object sought to be accomplished was the complete abolition of the common law and equity systems of pleading, as such, and the substitution in their stead of a new and different system. Practically all the codes provide that the forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by the code. Lest this positive statement give occasion for a possible doubt, many of the codes go so far as to add to it the further provision that the forms of pleading heretofore existing are abolished.

Acting, as they believed, in accord with this evident intention of the legislature, many judges attempted to treat the code as a unified, complete and exclusive system of pleading, which was to be viewed as entirely sufficient in itself without reference to any of the principles of pleading which had been developed throughout the long history of the common law. Under this conception of the code it was held to be not only useless, but, in fact, confusing and misleading, to attempt to interpret the code in the light of the systems which it had displaced.

The following extract from the opinion of Justice ALLEN, in *Bush v. Prosser* (1854), 11 N. Y. 351, well illustrates this view.

"The legislature, by the same act, also abolished all forms of pleading theretofore existing, and provided that thereafter the forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings were to be determined, should be those prescribed by that act. (§ 140.) So complete and thorough has been the departure from the former rules and forms of pleading, that it is hardly safe to rely upon analogies derived from that system in giving practical effect to the new. Based as the new is upon an entirely different theory, and having professedly different ends to accomplish, it is better, with a view to carry it out in its spirit, to consider it, as it is in truth, an entire new theory, to be construed and carried into effect according to its terms, and upon principles peculiar to itself. Difficult as it may be for a mind

trained to the logical and truly scientific rules of pleading under which justice has so long been administered in states and countries in which the common law has had sway, to cast aside all the rules which have been supposed to be founded in wisdom, and in practice to have accomplished a good purpose, for a new and confessedly imperfect scheme, it is safe to say that it must be done in order to give effect to the provisions referred to, and to give the system a fair trial; and that less injustice will be done in that way than by attempting to engraft the new upon the old, which can only be done to the prejudice of both."

On the other hand, the difficulty, if not the impossibility, of a sudden and complete abandonment of all the rules by which pleadings had been drawn and interpreted for centuries, compelled other judges to take a less radical view of the innovations of the code. It appeared to them that the primary object of all pleading was essentially the same, no matter what forms it took, and that the fundamental principles in accordance with which judicial controversies were to be laid before courts must inhere in the nature of the controversies themselves. The facts upon which litigating parties relied must be clearly and freely presented to the court, no matter what system of pleading was employed, and the points of difference between contending litigants must be exhibited. To do this required an exact use of language, a logical arrangement of allegations, a clear drawing of issues. No system of pleading could do away with the necessity for these things; therefore, why assume that the legislature intended to destroy at a blow the results of generations of labor bestowed upon the art of attaining these indispensible ends?

The opinion of SAMUEL L. SELDEN, one of the justices of the Supreme Court of the state of New York, in *Knowles v. Gee* (1850), 8 Barb. 300, 4 How. Pr. 316, is an excellent illustration of this view of the code. In the course of the opinion he says:

"It cannot be denied that the legislature, by adopting the *forms* of pleading heretofore in use in the courts of chancery, has given unequivocal evidence of a preference for those forms over those of the common law.

"On the other hand, the abolition of the only court in which those forms were used, the transfer of their jurisdiction to the courts of common law, and the retaining of

the forms and modes of trial peculiar to the latter, forbids the conclusion, that it was intended to subvert the entire system of rules which prevailed in the common law courts, and to substitute those of the obnoxious court of chancery.

"In continuing two systems of jurisprudence, therefore, administered under different forms by different tribunals, and resolving them into one, it became indispensable to borrow something from each, and the object of the legislature seems to have been, to select from both that which was most valuable, rejecting in each those portions which experience had proved to be productive of inconvenience. It is the duty of courts to aid in accomplishing this design, and in doing so they must necessarily look to the evils which existed, as well as to the means resorted to for their removal. The adoption of the forms of chancery pleadings, though not the necessary, was the natural consequence of adopting that principle in chancery jurisprudence, which recognized only one form of action for all cases. Many of the technical rules of the common law system of pleading may well have been considered as originating in, and connected with, those distinctions between the different forms of action which were peculiar to that law. There are, however, some of those rules which are so well adapted to accomplish the end of all pleading, that I should find it difficult to persuade myself that the legislature could have intended to abrogate them.

"No one of the least experience in courts of justice, or even in the affairs of life, can have failed to observe that almost all legal controversies depend upon some one or two points out of which the whole difficulty has arisen. A difference upon a single point will often break up the harmonious relations between two individuals, and lead them into a protracted and expensive litigation. The point in dispute may arise either upon a matter of fact, or a question of law, but, that once settled, the whole controversy ceases. The object of judicial proceedings is, to ascertain and decide this disputed point; and it is essential to the termination of every legal contest, that it be evolved and distinctly presented for decision. This indispensable end of judicial pleading was attained in different modes by the civil and common law. The rules of the latter were designed to develop and present the precise point in dispute upon the record itself, without requiring any action on the

part of the court for that purpose. Hence the parties were required to plead until their respective allegations terminated in a single *material* issue, either of law or of fact, the decision of which would dispose of the case. The result of this process was perfectly simple; but the system of rules by which it was attained was necessarily artificial and complex. If always skilfully applied, they would be sure to produce the end desired; but it would sometimes happen that, through ignorance or mistake, an issue would be formed, or a point presented, not involving the real merits of the controversy, and a decision be thus produced contrary to the real justice and equity of the case. This was the sole vice of the system; but it was sufficient to create a strong feeling against what is termed special pleading.

"Two remedies were applied. One was a liberal allowance of amendments and repleaders; the other, general pleadings, under which parties were allowed the widest scope in the proof of facts not appearing upon the record. The latter expedient has had many advocates, but the evils to which it tended were so obvious that it is now generally condemned, and is repudiated by the code.

"By the civil law the parties were not required to plead to issue, but were permitted to spread all the facts in detail, constituting their cause of action or defense at large upon the record; questions of law were not necessarily separated from questions of fact, but the whole case was presented in gross to the court for its determination.

"This system, of course, avoided the evil which attended that of the common law, of sometimes causing the case to turn upon some false, immaterial, or technical issue; but it had other defects peculiar to itself. It threw upon the courts the labor of methodizing the complex allegations of the parties, and developing the real points in dispute.

"They might be aided more or less in this by the preparation of abbreviations or abstracts by the parties or their counsel; but this work would often be very imperfectly performed, and would of course leave much to be done by the court before it could arrive even at the real point to be decided.

"There was an additional reason, too, why this system was not adopted in the common law courts in England. The determination of questions of law, and of fact, belonging to different tribunals, it was of course, extremely con-

venient, if not indispensable, that they should be separated upon the record before the case was presented for trial. Besides, as little time could be afforded at *uisi prius,* to evolve from a complicated mass of facts the points about which alone the parties differed, the rules requiring all issues to be *certain* and *single* would be sure to commend themselves to all who were in any way concerned in the disposition of such cases.

"On the other hand, when the court of chancery took its rise, and began to take cognizance of judicial contests, the mode of trial by jury not appertaining to that court, the inconvenience resulting from mingling questions of law and of fact, to be referred to different tribunals, was not felt by it. As the chancellor could take all the time requisite for the fullest examination, and as he assumed originally to eschew the strict and technical rules of the common law, and to proceed upon the broad equities of the case, he naturally encouraged the presentment of the facts at large. Hence the adoption of the forms of the civil law. Now, no one will dispute that to disencumber the record of all extraneous matters, and of everything irrelevant and immaterial and thus present to the judicial mind the naked point to be passed upon, is a highly desirable object; nor will it be denied, by anyone really acquainted with the subject, that the system of common law pleading was admirably adapted to accomplish that end. Nevertheless, it had one defect which has effected its overthrow in this state. It gave advantages to the skilful over the unskilful, which the system of the civil law did not afford. It may be safely assumed that it is this which has subverted it; because its offensive but harmless fictions, and its objectionable subtleties might all have been easily lopped off, without trenching upon that vital principle which required all issues to be *single, certain* and *material.*

"But while it is conceded that common law pleading, *as a system,* is supplanted, it is unnecessary to admit that every vestige of its valuable rules has been swept away. It has been my object, in this brief and imperfect sketch of the distinguishing characteristics of the two systems, so to exhibit the value of some of those rules, as to show that wisdom requires them to be retained, and the legislature must have so intended, so far as could be done consistently with the main object in view, to-wit: that of so simplifying

the mode of pleading that it could not be perverted by chicanery and cunning to purposes of injustice."

In *People v. Ryder* (1855), 12 N. Y. 437, Justice MARVIN, who at the time this decision was rendered, sat with Justice SELDEN upon the court of appeals, expressed very similar views, quoting Chitty on Common Law Pleading and citing common law decisions. He said: "The code requires that the complaint contain a plain and concise statement of facts constituting a cause of action, without unnecessary repetition. (§ 142.) This rule is substantially as it existed prior to its enactment in actions at law. Chitty says, in general, whatever circumstances are necessary to constitute the cause of complaint or the ground of defense, must be stated in the pleadings, and all beyond is surplusage; *facts* only are to be stated and not arguments or inferences, or matter of law, in which respect the pleadings at law appear to differ materially from those in equity. (1 Ch. Pl. 245.) At page 266, he says it is a most important principle of the law of pleading, that in alleging the fact it is unnecessary to state such circumstances as merely tend to prove the truth of it. The dry allegation of the fact, without detailing a variety of minute circumstances which constitute the evidence of it, will suffice. The object of the pleadings is to arrive at a specific issue upon a given and material fact; and this is attained, although the evidence of such fact to be laid before the jury be not specifically developed in the pleadings (and see *Firth v. Thrush,* 8 B. & C. 387; *Dyett v. Pendleton,* 8 Cow. 728).

"I have supposed it safe and a compliance with the code, to state the facts constituting the cause of action substantially in the same manner as they were stated in the old system in a special count."

In *Mobley v. Cureton* (1874), 6 S. C. 49, Justice WILLARD, in discussing the effect of the code, said:

"That the code intended materially to change the nature and effect of pleading, is clearly evinced by section 163, which says: 'All the forms of pleading heretofore existing are abolished, and hereafter the forms of pleading in civil actions in courts of record and the rules by which the sufficiency of the pleading is to be determined are those prescribed by this code of procedure.'

"Abolishing the forms of pleading necessarily abolishes the technical incidents depending wholly on such forms.

But the code does not in terms or intention abolish the substantial characteristics of the several pleadings that are retained either in name or by their equivalents under other names. Where an incident of pleading arises out of its substantial nature and not merely from its technical form, it cannot be considered as affected by this general provision of the code."

That the views expressed in the last three of the foregoing opinions were essentially correct, is demonstrated by the subsequent history of the code. Thus, the common counts, as employed at common law, have been almost universally sanctioned as suitable and proper under the code, though they are nowhere recognized by its language, and notwithstanding many courts have expressed the view that they violate the spirit of code pleading. The right to waive a tort and sue upon an implied contract still exists under the code as at common law. The common law rules against anticipating defenses and confusing issues are in force; the rules against pleading conclusions of law and matters of evidence are observed as well as most of the common law tests as to what allegations constitute violations of these rules; it is proper to plead facts according to their legal effect, just as the common law required; in many cases the plaintiff is permitted to plead a single cause of action in several forms to meet the exigencies of proof, exactly as he could do at common law; and in numerous other ways the fundamental rules of common law pleading, shorn, it is true, of their technicalities, have been adopted and employed in the development of a rational and comprehensive interpretation of the code.

This dependence of the code upon the principles of common law pleading is not only demonstrated by an analysis of the rules established under the code, but it has been repeatedly acknowledged in the broadest terms in recent decisions by the courts of the code states. Thus, in *Lassiter v. Roper* (1894), 114 N. C. 17, the court said (quoting *Parsley v. Nicholson,* 65 N. C. 210): "The rules of pleading at common law have not been abrogated. The essential principles still remain, and have only been modified as to technicalities and matters of form."

In *Huston v. Tyler* (1897), 140 Mo. 252, the court said: "The above cases recognize the doctrine that the 'fundamental requirements' of good pleading are and must re-

main the same, whether under code or at common law; that is to say, a pleading must be so drawn as to tender a definite issue or issues, and not leave the adversary to grope in the dark as to what the meaning of the pleading is; 'this is no more allowable now than formerly.' "

In *City of Logansport v. Kihm* (1902), 159 Ind. 68, the court quoted Chitty on Common Law Pleading as to the rule of certainty in stating facts, and held that this rule had been incorporated in the civil code of the state. The same rule was quoted in *Speeder Cycle Co. v. Teeter* (1897), 18 Ind. App. 474, where the court said: "The rule has not been changed under the code practice, but on the contrary, has been emphasized by express enactment of the legislature."

On the equity side, too, as Judge SELDEN suggests in the opinion above quoted, the principles of the chancery practice have been retained in so far as they are applicable. Thus, in dealing with the difficult questions involved in the joinder of causes of action in connection with the union of defendants, the courts in the code states have made frequent and extended research among the decisions of the old chancery judges upon the doctrine of multifariousness.[1] In regard to the materiality of allegations, the same distinction between issuable facts at law and material facts in equity, which was developed under the old system, is recognized under the code.[2] And in general, whenever the method of procedure, in a case falling within the domain of equity, is doubtful, the rules of the chancery practice will be looked to for light. As the Supreme Court of Missouri said, in *Tucker v. St. Louis Life Ins. Co.* (1875), 63 Mo. 588, 594:

"The code is not sufficiently comprehensive to embrace every varied phase which a case may assume before reaching judicial determination, and in consequence of this resort must frequently be had to common law methods of procedure, both in ordinary actions at law, as well as in proceedings looking merely to equitable relief. Numerous decisions of this court exemplify this. * * * This being

[1] Benson v. Keller (1900), 37 Ore. 120; Montserrat Coal Co. v. Coal Mining Co. (1897), 141 Mo. 149; Foster v. Landon (1898), 71 Minn. 494; Whitehead v. Sweet (1899), 126 Cal. 67; Henshaw v. Salt River, etc. Co. (1898), 6 Ariz. 151.

[2] Smith v. Smith (1897), 50 S. C., 54.

the case, and the code not prescribing the method to be pursued where a defendant asks affirmative relief from a co-defendant, except that a judgment giving affirmative relief may be rendered in such cases (Wagn. Stat., 1051, § 2) we must look to a certain extent to the rules of pleading and practice adopted by courts of chancery."

Common law pleading and equity pleading are therefore by no means foreign to the code, but have constituted a reservoir from which innumerable principles and rules have been drawn in the development of code pleading. It it true that as time goes by, the direct recourse which the code pleader has to these ancient systems tends to diminish, for the code is steadily producing a body of decisions which more and more completely covers the field. But if one would attain a really comprehensive appreciation of the spirit and scope of the code, he should preface or supplement his study of it by a thorough understanding of the systems out of which it grew.

SECTION 4. ABOLITION OF THE DISTINCTION BETWEEN ACTIONS AT LAW AND SUITS IN EQUITY.

One of the most striking and characteristic features of English and American law is the separation of rights and remedies into two classes, legal and equitable. This dual aspect of the law resulted fortuitously from the peculiar and largely accidental circumstances surrounding the development of the law of England. One tribunal obtained jurisdiction in one class of cases, and another tribunal in the other class. The law courts passed upon cases which fell within the arbitrary limits imposed by the authorized forms of original writs; they granted relief only in the form of money damages or judgments for the possession of real or personal property; they were prepared to try issues of fact with the aid of a jury. The courts of chancery, on the other hand, assumed to take jurisdiction of cases falling outside the scope of the law writs, thus aiming to fully supplement the limited jurisdiction of the law courts; they granted specific relief when compensation in money was deemed inadequate, decreeing specific performance of legal duties and restraining threatened invasions

of rights; and they did not submit controverted facts to the judgment of juries.

The differences here noted between the scope of the jurisdiction, the character of the relief and the method of trial, resulted in substantial differences in the pleadings employed in the two kinds of courts. The variety of actions for which relief could be had at law was limited. In some of them the allegations were in large part formulas, with just enough variation to give the case a concrete appearance; the facts were boiled down to an absolute minimum for the purpose of eliminating all matters of evidence, and conclusions of law were sought to be rigidly excluded, since the matters set forth in the pleadings must be in proper form for presentation to a jury of laymen; the issues must be single, certain and material, so as to be readily cognizable and decisive of the controversy.

The cases which came into chancery were usually far more complicated and elaborate than those which lent themselves to the comparatively simple descriptions contained in the original writs; they related to those peculiar and exceptional situations where an award of damages in money would not protect or recompense the plaintiff; they frequently involved many parties having different and diverse interests; and they required no sharp drawing of issues nor inflexible separation of matters of fact from matters of law, since the judges found the facts as well as the law. Accordingly, the complainant in a suit in equity stated his entire case at large in his bill, presenting to the court all the various circumstances upon which his equity rested, and the defendant in his answer made a full and fair response to all the allegations of the bill and presented such further facts and circumstances as were deemed important. There were many technical features connected with equity pleading, but the merits of the case were spread upon the record with much more freedom and informality than was true in actions at law.

Each system of pleading was a highly developed specialty, full of its own peculiar difficulties, though the common law system was perhaps the more refined and technical and the more rigidly construed.

Both these systems the code undertook to abolish, and

to establish in their place a single system adapted to the enforcement of both legal and equitable rights.[1] To this end it enacted that the distinction between actions at law and suits in equity, and the forms of all such actions and suits theretofore existing, were abolished, and that in their place there should thereafter be but one form of action for the enforcement of all rights and the redress of all

[1] THE PROVISIONS OF THE VARIOUS CODES ARE AS FOLLOWS:

Alaska. Carter's Ann. Codes, Code Civ. Pro., § 1.
"The distinction between actions at law and suits in equity and the forms of all such actions and suits are abolished. There shall be but one form of action for the protection of private rights and the redress and prevention of private wrongs, which is denominated a civil action."

Arizona. Rev. Stat., 1901, § 1289.
"The complaint shall set forth clearly the names of the parties, a concise statement of the cause of action, without any distinction between suits at law and in equity, and shall also state the nature of the relief which he demands."

Arkansas. Kirby's Digest, 1904, § 5981.
"There shall be but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be called a civil action."

California. Kerr's Codes, Code Civ. Pro. 1909, § 307.
"There is in this state but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs."

Colorado. Rev. Stat., 1908, Code Civ. Pro., § 1.
"The distinction between actions at law and suits in equity, and the distinct forms of action, and suits heretofore existing are abolished, and there shall be in this state but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be the same at law and in equity, and which shall be denominated a civil action, and which shall be prosecuted and defended as prescribed in this act."

Connecticut. Gen. Stat., 1902, § 607.
"There shall be but one form of civil action, and the pleadings therein shall be as follows:"

Idaho. Constitution, Art. V, § 1.
"The distinctions between actions at law and suits in equity, and the forms of all such actions and suits, are hereby prohibited; and there shall be in this state but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action."

Indiana. Burns St., 1908, § 249.
"There shall be no distinction in pleading and practice between actions at law and suits in equity; and there shall be but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action."

Iowa. Code, 1897, § 3426.
"All forms of action are abolished, but proceedings in civil actions may be of two kinds, ordinary or equitable."

Kansas. Gen. St., 1909, § 5603, Code Civ. Pro., § 10.
"The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished, and in

wrongs, which should be called a civil action. The various codes differed somewhat in their wording of this provision, but the substance is the same in all.

In regard to this abolition of the distinctions between actions at law and suits in equity, it is to be first observed that the code does not purport to change in any way the substantive principles of law or equity. It does not attempt to abolish any of the distinctions between law and equity, between legal and equitable rights. This would have been wholly impossible. A right to enforce a trust is absolutely

their place there shall be hereafter but one form of action, which shall be called a civil action."

Kentucky. Carroll's Codes, 1900, § 4.
"There shall be but one form of action."

Minnesota. Rev. Laws, 1905, § 4052.
"The distinction between actions at law and suits in equity, and the forms of such actions and suits, are abolished. There shall be in this state but one form of action for the enforcement or protection of private rights and the redress of private wrongs. This shall be called a civil action."

Missouri. Ann. St., 1906, § 539.
"There shall be in this state but one form of action for the enforcement or protection of private rights, and redress or prevention of private wrongs, which shall be denominated a civil action."

Montana. Constitution, Art. VIII, § 28.
"There shall be but one form of civil action, and law and equity may be administered in the same action."

Nebraska. Comp. St., 1911, § 6572.
"The distinction between actions at law and suits in equity, and the form of all such actions and suits heretofore existing are abolished; and in their place there shall be hereafter but one form of action, which shall be called a civil action."

Nevada. Comp. Laws, 1900, § 3096.
"There shall be in this state but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs."

New York. Chase's Code, Civ. Pro., 1910, § 3339.
"There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished."

North Carolina. Revisal of 1905, § 354.
"The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished, and there shall be hereafter but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action."

North Dakota. Rev. Codes, 1905, § 6767.
Identical with the North Carolina statute, *supra.*

Ohio. Gen. Code, 1910, § 11238.
"There shall be but one form of action, to be known as a civil action.

different from a right to sue for fraud, and no legislative enactment could make the two the same. Equity jurisprudence is identically the same whether the code system or the common law system of pleading is in force. A suitor in a code state is entitled to invoke the principles of equity to precisely the same extent and under exactly the same conditions as a suitor in a state retaining the old practice. The only effect of the code upon the relations of law and equity has been in the method of pleading provided for establishing legal and equitable rights. Formerly they were established by resorting to different courts having different systems of pleading and granting different kinds of relief. Under the code one court entertains both kinds of cases, operates under one general system of pleading, and administers both kinds of relief.

In *Cole v. Reynolds*, 18 N. Y. 76, HARRIS, J., said: "By the code, the distinction between actions at law and suits in equity is abolished. The course of proceeding in both classes of cases is now the same. Whether the action depend upon legal principles or equitable, it is still a civil

This requirement does not affect any substantive right or liability, legal or equitable."

Oklahoma. Comp. Laws, 1909, § 4208.
Identical with the Kansas statute, *supra.*

Oregon. Lord's Laws, 1910, Code Civ. Pro., § 1.
"The distinction heretofore existing between forms of action at law is abolished, and hereafter there shall be but one form of action at law for the enforcement of private rights or the redress of private wrongs."

South Carolina. Code, 1902, § 89.
"There shall be in this state but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action."

South Dakota. Code Civ. Pro., 1903, § 36.
Identical with North Carolina statute, *supra.*

Utah. Comp. Laws, 1907, § 2852.
Identical with the California statute, *supra.*

Washington. Rem. & Bal. Code, 1910, § 153.
Same as the Arkansas statute, *supra.*

Wisconsin. St., 1898, § 2600.
"The distinction between actions at law and suits in equity, and the forms of all such actions and suits, have been abolished, and there is in this state but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which is denominated a civil action."

Wyoming. Comp. Stat., 1910, § 4286.
Identical with Kansas statute, *supra.*

action, to be commenced and prosecuted without reference to this distinction.

"But, while this is so in reference to the form and course of proceeding in the action, the principles, by which the rights of the parties are to be determined, remain unchanged. The code has given no new cause of action. In some cases parties are allowed to maintain an action who could not have maintained it before, but in no case can such an action be maintained where no action at all could have been maintained upon the same state of facts. If, under the former system, a given state of facts would have entitled a party to a decree in equity in his favor, the same state of facts now, in an action prosecuted in the manner prescribed by the code, will entitle him to a judgment to the same effect. If the facts are such that, at the common law, the party would have been entitled to judgment, he will, by proceeding as the code requires, obtain the same judgment. The question, therefore, is whether, in the case now under consideration, the facts, as they are assumed to be, would, before the adoption of the code, have sustained an action at law or a suit in equity."

In *Emmons v. Kiger,* 23 Ind. 487, the court said, speaking through FRAZER, J.: "If there is anything in the code which justified that radical change which it effected in the pleadings and practice in courts of justice, by substituting a new and untried system for one which had been long used, and had become thoroughly settled, it is the very fact that it swept away those distinctions between suits at law and in equity, and between the different forms of actions, by which justice had been so often defeated, in consequence of mistakes in the names with which parties christened their suits. Instead of the bill in chancery, the four classes of actions in form *ex contractu,* and the four *ex delicto,* nine in all, one form of action was substituted. But it is nevertheless true that no change was made as to the rights of parties, by the introduction of new machinery for the attainment of justice. The same essential facts, to obtain relief, must be alleged and proven now, as before. And to obtain the relief, which formerly must have been sought by bill in equity, the same substantial allegations must now be contained in the complaint, which were then required in the bill."

In *Exchange Bank v. Ford,* 7 Colo. 320, the court said:

"This is purely a legal action; it is in the nature of *assumpsit;* no cause of action in equity is stated, and no equitable relief is demanded by either party. The code abolishes *forms* of action merely, including the difference in this respect between actions at law and suits in equity, and provides a single method of pleading; it does not undertake to do away with the distinction between legal and equitable causes of action; it does not rescind the rule that the allegation and the proof must correspond, nor the correlative principle, that the judgment must follow the pleadings. To procure standing in a court of equity and obtain equitable relief, the pleader must still state an equitable cause of action or defense. He cannot now, any more than he could before the code was adopted, obtain the benefit in a court of law of principles like the one here invoked, which theretofore applied exclusively to chancery proceedings."

And in *Dewey v. Schreiber Implement Co.,* 12 Idaho 287, it was said: "We recognize the fact that the distinction between suits in equity and actions at law has been prohibited, and that in this state there is but one form of action for the enforcement or protection of private rights or redress of private wrongs, which is denominated as a civil action. That, however, does not abolish the rules of law or the rules of equity; they remain although the distinction between the actions at law and suits in equity and the forms of such actions and suits are prohibited by our constitution."

It is further to be noted that the abolition of the distinction between actions at law and suits in equity does not in any way affect the character of the relief which a suitor may obtain on a given state of facts. If, under the old system, he would have been entitled to an equitable remedy, he will, under the code, be entitled to the same remedy and will receive it. If his cause of action would have been termed legal before the code, he will obtain legal relief under the code system.

Thus, in *Klonne v. Bradstreet,* 7 Ohio St. 325, the court said: "The code has abolished the distinction between actions at law and suits in equity, so far as relates either to name or form, and there has been substituted for them what is called 'a civil action.' But a judgment, when pronounced and recorded, must be, in effect, a decree, conferring the same relief which the party might have obtained

in chancery, if the case were pending there, provided that mode of relief be appropriate to the facts of the case. When the facts, upon which the court is to pass, would not, under the old practice, confer upon it equitable jurisdiction, the form of relief is the same it formerly was by judgment at law. Hence, although the *forms* of action are abolished, the same remedy is obtained by the judgment of the court which was formerly administered by the chancellor's decree. The only change made by the code in this particular consists in the *form* of the action, and not in any substantial modification of the remedy."

And in *Reubens v. Joel,* 13 N. Y. 493, Justice SELDEN, speaking for the court, said: "By what process can these two modes of relief be made identical? It is possible to abolish one or the other, or both, but it certainly is not possible to abolish the distinction between them. The legislature may, unless prohibited by the constitution, enact that no court shall hereafter have power to grant any relief, except in the form of damages, and thereby abolish all suits in equity; or that all courts shall have power to mould the relief to suit the particular case, and thereby virtually abolish actions at law as a distinct class. To illustrate by a single case: They may provide that where a vendor of land, who has contracted to sell and received the purchase money, refuses to convey, the vendee shall have no remedy but an action for damages, or, on the other hand, that he shall be confined to a suit for a specific performance; but it is clearly beyond the reach of their powers to make these two remedies the same."

Similarly, in Wisconsin, in the leading case of *Bonesteel v. Bonesteel,* 28 Wis. 250, the court said, through LYON, J.: "The legislature may abolish the old forms of actions, and has done so, but the essential principles of equitable actions and equitable relief, as distinguished from legal actions and remedies, are as vital now, and as clearly marked and defined, as before the enactment of the code. They are indestructible elements in our system of jurisprudence, and the courts are constantly required to recognize and apply them."

The converse of the principle last stated is also true, namely, that when, under the old system, no relief could be had in equity, the same result follows under the new system. Equitable relief under the code is thus subject to the

familiar limitation imposed under the old system, that it will not be granted where there is a plain, adequate and complete remedy at law.

This doctrine is elementary and has never been seriously questioned. A few quotations from recent cases decided under the code will illustrate the identity of the rule there invoked with that developed under the old dual system.

In *Donovan v. McDevitt* (1907), 36 Mont. 61, the court said: "Does the complaint state facts sufficient to constitute a cause of action for an injunction? It is a well recognized rule that a court of equity will not interfere to enjoin the enforcement of a judgment, if the judgment debtor has a plain, speedy and adequate remedy at law. And that the plaintiff, Donovan, had such a remedy in this instance is perfectly plain."

In *Brown v. Reed* (1904), 72 Nebr. 167, the court dismissed a case in which an injunction was sought, saying: "We are unable to see any grounds for the interposition of a court of equity in behalf of the plaintiff in this case. He has utterly failed to show that he is without an adequate remedy at law."

In *Ritterhoff v. Puget Sound National Bank* (1905), 37 Wash. 76, in passing upon a case where equitable relief was prayed for, the court said: "In defining the jurisdiction of courts of equity, it is a well established principle that equity will not relieve when there is a full, adequate and complete remedy at law."

CHAPTER I.

PARTIES.

SECTION 1. IN WHOSE NAME ACTION TO BE PROSECUTED.[1]

(a) Real Party in Interest.

STEWART v. PRICE.

Supreme Court of Kansas. 1902.

64 Kansas, 191.

The opinion of the court was delivered by

GREENE, J.: The defendant in error, C. E. Price, commenced this action before a justice of the peace in Allen county against D. W. Stewart, doing business under the firm name of the People's Telephone Company, to recover on two causes of action. The first was on an account due from Stewart to himself. The second was on an account due from Stewart to Mrs. A. Thompson. The latter account was itemized, verified, and assigned in writing to Price. The assignment was regular and admitted. To this second cause of action the plaintiff in error answered that Price was not the

[1] THE CODE PROVISIONS OF THE VARIOUS STATES UPON THIS SUBJECT ARE AS FOLLOWS:

Alaska. Carter's Ann. Codes, 1900; Code Civ. Pro.

"§ 25. Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in section twenty-seven; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract."

"§ 27. An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom, or in whose name a contract is made for the benefit of another is a trustee of an express trust within the meaning of this section."

Arizona. Rev. Stat., 1901.

"§ 1299. Every action shall be prosecuted in the name of the real party in interest; *Provided*, An executor or administrator, or a trustee of an express trust or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is brought."

"§ 1300. A person with whom or in whose name a contract for the bene-

owner of the account, and therefore not the real party in interest. There was no defense to the account; nor was there any claim that it had been assigned for the purpose of acquiring or giving the court jurisdiction over the defendant, when otherwise it could not have acquired such jurisdiction. The Thompson account was assigned to Price that he might join it with his own in an action he contemplated bringing against Stewart, and when collected he was to pay Mrs. Thompson the entire proceeds thereof. * * *

fit of another is made, and the assignee of any chose in action is a trustee of an express trust, within the meaning of this section."

Arkansas. Kirby's Digest, 1904.

"§ 5999. Every action must be prosecuted in the name of the real party in interest, except as provided in sections 6001, 6002, and 6003."

"§ 6002. An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or the state, or any officer thereof, or any person expressly authorized by the statute to do so, may bring an action without joining with him the person for whose benefit it is prosecuted."

California. Kerr's Codes, 1908, Code Civ. Pro.

§ 367. Same as § 5999 of the Arkansas statutes, *supra.*

§ 369. Same as § 27 of the Alaska statutes, *supra.*

Colorado. Rev. Stat., 1908, Code Civ. Pro.

"§ 3. Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act."

§ 5. Same as § 27 of the Alaska statutes, *supra,* with one or two verbal variations.

Connecticut. Gen Stat., 1902.

"§ 620. An executor, administrator, or trustee of an express trust, may sue or be sued, without joining the persons represented by him and beneficially interested in the suit."

Idaho. Rev. Codes, 1908.

§ 4090. Same as § 367 of the California statutes, *supra.*

§ 4092. Same as § 27 of the Alaska statutes, *supra.*

Indiana. Burn's Ann. Stat., 1908.

§ 251. Same as § 25 of the Alaska statutes, *supra.*

§ 252. Same as § 27 of the Alaska statutes, *supra,* adding, "It shall not be necessary to make an idiot or lunatic a joint party with his guardian or committee, except as may be required by statute."

Iowa. Code, 1897.

"§ 3459. Every action must be prosecuted in the name of the real party in interest, but an executor or administrator, a guardian, a trustee of an express trust, a party with whom or in whose name a contract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is prosecuted."

Kansas. Gen. Stat., 1909.

§ 5618. Same as § 25 of the Alaska statutes, *supra.*

"§ 5620. An executor, administrator, guardian, trustee of an express trust, a person with whom or in whose name a contract is made for the

The only question presented for our consideration is whether Price could maintain this action in his own name on the second cause of action. Can the assignee of a verified itemized account, assigned in writing, where the assignment is regular and admitted, maintain an action thereon in his own name, when by a previous arrangement he had agreed to pay the proceeds collected to his assignor? Our code (section 26) provides, "Every action must be prosecuted in the name of the real party in interest except as otherwise provided in section 28." It is not contended by

benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way."

Kentucky. Carroll's Codes, 1895.
§ 18. Same as § 5999 of the Arkansas statutes, *supra.*
"§ 21. A personal representative, guardian, curator, committee of a person of unsound mind, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, a receiver appointed by a court, the assignee of a bankrupt, or a person expressly authorized by statute to do so, may bring an action without joining with him the person for whose benefit it is prosecuted."

Minnesota. Laws, 1905.
§ 4053. Same as § 25 of the Alaska statutes, *supra,* adding a provision for suing as representatives of a class.
§ 4055. Same as § 27 of the Alaska statute, *supra,* adding the words "or guardian" after the word "administrator."

Missouri. Ann. Stat., 1906.
§§ 540, 541. Same as §§ 25, 27 of the Alaska statutes, *supra.*

Montana. Rev. Codes, 1907.
"§ 6477. Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A person with whom or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section."

Nebraska. Comp. Stat., 1911.
§ 6598. Same as § 5999 of the Arkansas statutes, *supra.*
§ 6601. Same as § 5620 of the Kansas statutes, *supra.*

New Mexico. Comp. Laws, 1897.
§ 2685, sub-sec. 2. Same as § 5999 of the Arkansas statutes, *supra.*
§ 2685, sub-sec. 3. Same as § 27 of the Alaska statutes, *supra.*

Nevada. Comp. Laws, 1900.
§ 3099. Same as § 3 of the Colorado statutes, *supra.*
§ 3101. Same as § 27 of the Alaska statutes, *supra.*

New York. Chase's Code, 1910, Code Civ. Pro.
§ 449. Same as § 6477 of the Montana statutes, *supra.*

North Carolina. Revisal of 1905.
§ 400. Same as § 25 of the Alaska statutes, *supra,* adding certain other provisions.
§ 404. Same as § 27 of the Alaska statutes, *supra.*

either party that the case falls within any of the exceptions. It must therefore be considered solely with reference to the meaning of section 26. In examining this section it will be observed that it does not say that it is the person in whose name the right of action stands, or the person who holds the legal title thereof, that may prosecute the action, but that "every action must be prosecuted in the name of the real party in interest." If Price failed to recover against Stewart, he would not be liable to Mrs. Thompson. The loss would be wholly that of Mrs. Thompson. Is the real party in interest the person who is to be benefited or who sustains a loss by the result, or is it the person who holds the legal title to the thing in action? This

North Dakota. Rev. Codes, 1905
§ 6807. Same as § 5999 of the Arkansas statutes, *supra.*
§ 6809. Same as § 27 of the Alaska statutes, *supra.*

Ohio. Gen. Code, 1910.
§ 11241. Same as § 5999 of the Arkansas statute, *supra,* adding certain provisions as to suits by assignees.
§ 11244. Same as § 5620 of the Kansas statutes, *supra,* omitting the last clause as to official bonds.

Oklahoma. Comp. Laws, 1909.
§ 5558. Same as § 25 of the Alaska statutes, *supra.*
§ 5560. Same as § 5620 of the Kansas statutes, *supra.*

Oregon. Lord's Laws, 1910, Code Civ. Pro.
§§ 27, 29. Same as §§ 25, 27 of the Alaska statutes, *supra.*

South Carolina. Code of Laws, 1902, Code Civ. Pro.
§ 132. Same as § 25 of the Alaska statutes, *supra,* adding certain other provisions.
§ 134. Same as § 27 of the Alaska statutes, *supra.*

South Dakota. Rev. Codes, 1903.
§ 80. Same as § 25 of the Alaska statutes, *supra,* adding certain other provisions.
§ 82. Same as § 27 of the Alaska statutes, *supra.*

Utah. Comp. Laws, 1907.
§ 2902. Same as § 6477 of the Montana statutes, *supra.*

Washington. Rem. & Bal. Codes, 1910.
§ 179. Same as § 3 of the Colorado statutes, *supra.*
§ 180. Substantially the same as § 27 of the Alaska statutes, *supra,* adding after the word "administrator," the words "or guardian of a minor or person of unsound mind."

Wisconsin. Stat., 1898
§ 2605. Same as § 25 of the Alaska statutes, *supra.*
§ 2607. Substantially the same as § 27 of the Alaska statutes, *supra.*

Wyoming. Comp. Stat., 1910.
§ 4311. Same as § 5999 of the Arkansas statutes, *supra,* adding certain provisions as to suits by assignees.
§ 4313. Same as § 5620 of the Kansas statutes, *supra,* omitting the last clause as to official bonds.

section is plain and unambiguous, and seems incapable of misunderstanding. By its terms it excludes the idea that any person other than the one benefited or injured by the result of the litigation can be intended. To hold otherwise would appear to be doing violence to language.

* * * * * * * * * * *

SMITH and ELLIS, JJ., concurring.

POLLOCK, J. (concurring). In concurring with the majority in this case, I do so not because of the belief that the decision is supported by the larger number of adjudicated cases, but for the reason that I believe it to be so commanded by the lawmaking power of the state, and in such clear and unmistakable language as to leave no escape therefrom, and to render the result reached inevitable. Other courts of high standing and authority, by the same process of reasoning employed by my dissenting associates, have announced a different conclusion. The question, however, remains, are such decisions correct in principle, sound in reason? * * *

* * * * * * * * * * *

Mr. Black, in his Law Dictionary (page 997), defines the real party in interest, within the meaning of this statute, as follows:

"In statutes requiring suits to be brought in the name of the 'real party in interest,' this term means the person who is actually and substantially interested in the subject-matter, as distinguished from one who has only a nominal, formal, or technical interest in it or connection with it."

The Encyclopedia of Pleading and Practice, volume 15, at page 710, says:

"The real party in interest, within the meaning of this provision of the code, is the person who will be entitled to the benefits of the action if successful,—one who is actually and substantially interested in the subject-matter, as distinguished from one who has only a nominal, formal, or technical interest in or connection with it."

Mr. Bliss, in his work on Code Pleading (3d Ed.), note to section 45, says:

"This raises the question, who is the 'real party in interest?' The real party in interest is the party who is to be benefited or injured by the judgment in the case. It will be observed that the rule provides the action must be prosecuted in the name of the real party in interest, and, of

course, if the defense can show that the plaintiff or plaintiffs are not the real parties in interest, the action must fail."

The assignee of an account or chose in action is the real party in interest, and entitled to bring an action thereon, providing by such assignment the beneficial interest in or ownership of such chose in action is thereby transferred. But it is the interest or ownership, not the transfer, that gives the right of action. The owner would have the right of action without and independent of the formal assignment or transfer. Applying this rule to the case at bar, is defendant in error the real party in interest, and entitled to maintain an action upon the Thompson account? Turning to the record, we find defendant in error did not purchase this account. It was not given to him. He did not become the owner thereof, or entitled to demand and hold any beneficial interest therein. Mrs. Thompson did not sell this account, give it away, or part with any beneficial interest in the account. She was the owner of the account,—remained the owner. Loss of the account was her loss. Recovery upon the account was her recovery. All that was in fact done, as shown by the record, is this: A statement of the account, verified, was formally transferred to defendant in error, not for the purpose of vesting in him any ownership thereof, but for the purpose of enabling him to join it in an action upon an account of his own. He did not intend to become the owner of the account, and did not. Mrs. Thompson did not intend to part with her interest in and ownership of the account, and did not. At all times she remained the owner and party in interest in the account. She at all times was and remained the real party in interest, and the only party entitled to bring and maintain an action for its recovery, without doing violence to the provision of the code now under consideration.

An extended review of the authorities pro and con upon this proposition (and they are many) would, to my mind, tend to the confusion of that which is and ever must remain plain, and would evince a lack of confidence in a proposition that is and must ever remain self-evident.

DOSTER, C. J.: I concur in the majority opinion, and approve the reasoning of Mr. Justice POLLOCK. It is legally impossible for one to transfer to another the mere

right to bring a lawsuit,—that and nothing more,—and that was all that was attempted in this case.

GREENE, J. (dissenting.): I cannot agree with the opinion of the court. The conclusion reached is against the great weight of adjudicated cases and the opinion of code writers, as well as a former decision of this court, and, in my judgment, is based upon a misconception of the code and the purpose intended to be accomplished by its adoption. If the majority opinion is correct, the code has not only changed the equity rule of pleading in actions on contracts and other choses in actions, but has also changed the law of commercial paper, for the reasoning applies with equal force to actions on negotiable promissory notes.

At common law, promissory notes and other negotiable instruments were assignable, and the holder and indorsee thereof could prosecute an action thereon in his own name, not because of any rule of pleading, but because of the law of commercial paper; and in such actions the makers, acceptors, or indorsers could not question his title in any manner short of impeaching its good faith. Not so with personal contracts and other choses in actions. These were not assignable so as to give the assignee a right of action at law in his own name. He was required to sue in the name of the assignor, or, if he be dead, in the name of his personal representative. This rule was based upon the doctrine that there was no mutuality or reciprocity of contract between the original promisor and the assignee. At all times, however, the person holding the legal title to a chose in action might prosecute the action in equity in his own name without joining with him the original obligee, or any of the persons to whom such original obligee had assigned the contract. What the code intended to do by the provision in question was to abolish the common-law rule of pleading in actions on contracts and other choses in actions, and adopt the equity rule as to parties.

This rule is clearly stated by Mr. Pomeroy in his work on Code Remedies (3d Ed. § 249):

"The fundamental principle may be stated as follows: The plaintiff who institutes an equitable action must bring before the court all those persons who have such relations to the subject-matter of the controversy that, in order to prevent further litigation by them, they must be included in and bound by the present decree,—in other words, all

those persons who are so related to the controversy and its subject-matter that, unless thus concluded by the decree, they might set up some future claim and commence some future litigation, growing out of or connected with the same subject-matter, against the defendant who is prosecuted in the present suit, and from whom the relief therein is actually obtained."

In *Walker v. Mauro*, 18 Mo. 564, Mr. Chief Justice GAMBLE says:

"The effect of our new code of practice in abolishing the distinction between law and equity is to allow the assignee of a chose in action to bring suit in his own name in cases where by the common law no assignment would be recognized. In this respect the rules of equity are to prevail, and the assignee may sue in his own name."

In view of this rule, as stated by Mr. Pomeroy, and its purpose as stated by Chief Justice GAMBLE, it is difficult to understand why one holding by written assignment an itemized, verified account, may not sue in his own name. Does not such person represent all persons who are related to the controversy and its subject-matter? Would not a decree settle all future controversies growing out of or connected with the same subject-matter? If these questions are answered in the affirmative, it will have to be conceded that the plaintiff is within the rule stated, and may therefore maintain this action. Could the assignor in this instance after having appeared in court and assisting the assignee in the litigation, by testifying that the assignment was regular, and the defendant therein did not owe her anything, be heard to set up this claim as a cause of action against the defendant after the entry and satisfaction of a judgment? The provision intended to adopt the equity rule which permits the assignee holding the legal title to a chose in action to bring suit in his own name, instead of that of the original promisee or his personal representative, and without joining with him such original promisee. It cannot be said that this provision was adopted for the purpose of preventing persons who had no interest in a litigation from instituting suits. In the first place, no general complaint of that kind has been made; and, second, lawsuits carry with them too great penalties for such a practice to ever become obnoxious. The certainty of defeat is a sufficient preventative of any continued wrongs of this kind.

In Daniel on Negotiable Instruments, volume 2, section 1181, it is said: "Any holder of a bill or note who can trace a clear legal title to it is entitled to sue on it in his own name, whether he possesses the beneficial interest in its contents or not." Mr. Pomeroy, after treating of the right of an assignee of a promissory note to maintain an action thereon, says: "Sec. 132. Analogous to the subject discussed in the preceding paragraph is the question whether an assignee, to whom a thing in action has been transferred by an assignment which is absolute in its terms so as to vest in him the entire legal title, but which by means of a contemporaneous and collateral agreement is in fact rendered conditional or partial, is the real party in interest. It is now settled by a great preponderance of authority, although there is some conflict, that if the assignment, whether written or verbal, of anything in action, is absolute in its terms, so that by virtue thereof the apparent legal title vests in the assignee, any contemporaneous collateral agreement by virtue of which he is to receive a part only of the proceeds, 'and is to account to the assignor or other person for the residue, or even is to thus account for the whole proceeds, or by virtue of which the absolute transfer is made conditional upon the fact of recovery, or by which his title is in any other similar manner partial or conditional,' does not render him any the less the real party in interest. He is entitled to sue in his own name, whatever collateral arrangements have been made between him and the assignor respecting the proceeds. The debtor is completely protected by the assignment, and cannot be exposed to a second action brought by any of the parties—either the assignor or other—to whom the assignee is bound to account. This is the settled doctrine in most of the states."

This rule, as stated by the most scientific code writer America has produced, is well understood by courts, and, with two exceptions, has been followed.

The case of *City Bank of New Haven v. Perkins,* 29 N. Y. 554, 568, 86 Am. Dec. 332, was an action on two bills of exchange, for $10,000 each, indorsed by the defendant, and two other bills of exchange, for $5,000 each, accepted by him. The defendant denied the indebtedness, and also denied that the plaintiffs were the legal holders and owners of said bills, and alleged that said bills belonged to the

bank of Akron, Ohio. It appeared upon the trial that the defendant owed the amount of the bills in suit. The only question was whether the plaintiffs were the legitimate holders. The court said:

"But as I understand the rule, nothing short of actual mala fides, or notice thereof, will enable a maker or indorser of such paper to defeat an action brought upon it by one who is apparently a regular indorser or holder, especially where there is no defense as to the indebtedness. * * * This rule is founded in the most obvious dictates of reason and sound policy, and should be inflexibly maintained. As to anything beyond the bona fides of the holder, the defendant, who owes the debt, has no interest."

* * * * * * * * * * *

The case of *Cassidy v. Woodward,* 77 Iowa, 357, 42 N. W. 319, 320, was an action involving the title and ownership of 80 acres of land. The objection was that the plaintiff was not the real party in interest. In passing upon this question the court says: "It has uniformly been held by this court that under this provision of the code the party holding the legal title to a cause of action, though he be a mere agent or trustee, with no beneficial interest therein, may sue in his own name." *Cottle v. Cole,* 20 Iowa, 481; *Rice Savery,* 22 Iowa 470; *Vimont v. Railway Co.,* 54 Iowa 514, 17 N. W. 31, 21 N. W. 9.

In *Minnesota Thresher Co. v. Heipler,* 52 N. W. 33, 49 Minn. 397, 398, it is said:

"By the terms of the order or draft sued on, the drawer directs the defendant to pay the plaintiff a certain sum. The defendant accepted the draft, expressly agreeing to pay the plaintiff the sum named. Clearly, the plaintiff held the legal title to the demand, and was the real party in interest. It did not concern the defendant that there was an agreement between the drawer and the plaintiff that the latter took the order only for collection; the proceeds, when collected, to be applied on the indebtedness of the former to the latter. No exceptions were taken on the trial of the cause which raised any other question."

* * * * * * * * * * *

The case of *Young v. Hudson,* 99 Mo. 102, 106, 12 S. W. 632, 633, was an action upon three promissory notes and an account for merchandise, all alleged to have been regularly transferred to plaintiff. The defense was that the

assignment of the account to plaintiff was without consideration, and was a mere pretense and sham, and the assignors, being the owners and entitled to whatever sum might be collected on it, were the real parties in interest. Speaking on this question, the court said:

"The assignment was regular and formal. There was evidence of defendant's admission of the original indebtedness it exhibited. But no consideration for its transfer to plaintiff appeared. The account was evidently assigned to him to collect for the use of the assignors. That did not preclude a recovery. An assignee of a chose in action arising out of contract may sue upon it in his own name, though the title was passed to him only for the purpose of collection."

In *McPherson v. Weston*, 64 Cal. 275, 281, 30 Pac. 842, 845, the defense was that the plaintiff was not the owner of the note, and therefore not the real party in interest. It was ruled:

"It makes no difference that the plaintiff paid nothing for the note. Forbes had the right to indorse it to him whenever the note became his property. He held it with the same right as any other owner had." In the syllabus the court says: "The transfer to plaintiff was without consideration, and merely for the purpose of collection. *Held*, that the transfer to plaintiff was valid, and that he was entitled to judgment against Robinson as an indorser."

* * * * * * * * * * *

If Stewart had paid Price the amount of this account after the assignment, and before the suit, does any one doubt that this would have been a complete satisfaction? Price had been authorized to receive the money. The account had been assigned to him and placed in his hands. A receipt from him would have been sufficient to protect Stewart, and could have been successfully pleaded in payment to any action thereafter prosecuted by Mrs. Thompson on that account. Holding the legal title, as he did, with authority to collect and receipt in full, why may he not maintain an action in his own name?

The code did not intend to adopt a rule that changes the law of commercial paper, nor that abolishes the equity rules as to parties to actions on contracts; but it intended to abrogate the common-law rule, and adopt and apply the

equity rule of pleadings, so far, at least, as concerns the plaintiffs in actions on contracts and other choses in action.

The principle running through and controlling in all of the foregoing decisions is that the person in possession and holding the legal title to the evidence of indebtedness sued on is the real party in interest, within the meaning of the code, notwithstanding the entire beneficial interest is in another.[1]

JOHNSTON and CUNNINGHAM, JJ., concurring in the dissenting opinion of GREENE, J.

[1] The assignee, being the holder of the legal title, was held in Guerney v. Moore (1895), 131 Mo. 650, 668, to be "both the real party in interest and the trustee of an express trust."

MANLEY v. PARK.

Supreme Court of Kansas. 1904.

68 Kansas, 400.

The opinion of the court was delivered by

MASON, J.: Richard A. Park, who is succeeded by Anna O. Park, held a debenture bond issued by a corporation in which George Manley owned stock. The corporation having suspended business for more than a year, and Manley having died, Park sued the executor, Reuben M. Manley, as a stockholder, on the bond, and recovered judgment, to review which this proceeding is brought.

* * * There was evidence that, while the bond referred to had been assigned to Park, he had no beneficial interest therein; the assignment having been made to enable him to realize on the claim in the interest of the original payee. We are asked to hold, upon the authority of *Stewart v. Price,* 64 Kan. 191, 67 Pac. 553, that under these circumstances he was not the real party in interest, and could not maintain the action. That case was decided by a divided court, three justices dissenting. The two conflicting views involved were there fully discussed, the authorities in support of each being reviewed. * * * For reasons therein stated, we now believe that the law should then have been declared in accordance with the minority opinion, and that

it is better to make such declaration at this time, than to confirm that case as an authoritative precedent.

When the owner of a note, for reasons satisfactory to himself, assigns it to another, thereby vesting in him the full legal title, the assignee becomes, so far as the debtor is concerned, the real party in interest. The original owner is still the person to be finally benefited by the litigation, but his legal demand is no longer against the maker of the note, but against the person to whom he has assigned it. When the obligor is sued by such assignee (no claim as innocent purchaser being involved), he can make any defense he could have made against the assignor; he is fully protected against another action; and in no way is it a matter of the slightest concern to him what arrangement between the plaintiff and the original creditor occasioned the assignment. This being true, it would be a sacrifice of substance to form to permit the defendant to defeat the action by showing a failure of consideration for the transfer, or that the plaintiff was bound to account to his assignor for a part or all of the proceeds. We hold that the objection urged to the judgment on the ground that plaintiff was not the real party in interest is untenable.[1]

* * * * * * * * * *

All the Justices concurring.

[1] *Accord:* Brown v. Powers (1900), 53 N. Y. App. Div., 251 (assignee of a judgment); Hankwitz v Barrett (1910), 143 Wis. 639 (assignee of a subscription).

The case of Brown v. Ginn (1902), 66 Ohio St. 316, holds that the assignee of an account for collection only, who is under contract to pay over the proceeds of the action, less costs and fees for prosecuting the action, to his assignor, is not the real party in interest and cannot sue in his own name: neither is he the trustee of an express trust.

SWIFT AND COMPANY v. WABASH RAILROAD COMPANY.

Kansas City Court of Appeals. 1910.

149 Missouri Appeal, 526.

JOHNSON, J.: Swift & Co., a corporation engaged in the packing business, conducted a branch establishment for the packing of poultry, butter, and eggs in a building in Cen-

tralia, Mo., near defendant's railroad. The petition alleges, and the evidence of plaintiff tends to show, that this building and its contents were destroyed September 16, 1907, by fire caused by sparks emitted from locomotives operated on the railroad, and plaintiff brought this action under the statute to recover $2,600, the alleged value of the personal property destroyed which at the time belonged to plaintiff. The answer, in addition to a general denial, pleads facts which defendant contends show that plaintiff is not the real party in interest, and therefore is not entitled to maintain the action. A trial to a jury resulted in a verdict and judgment for plaintiff in the sum of $2,566.91, and the cause is here on the appeal of defendant.

Counsel for defendant contend that the jury should have been directed to return a verdict for defendant for two reasons, viz., first, that the evidence of plaintiff does not tend to show that the fire which destroyed plaintiff's property was caused by sparks from defendant's locomotive; and, second, that plaintiff has neither the legal title nor any beneficial interest in the cause of action, if one exists, and, consequently, has no right to prosecute the action.

The first of these propositions of defendant shall be briefly answered. We considered the circumstances of this very fire in the case of *Erhart v. Railroad,* 136 Mo. App. 617, and held that the evidence there adduced did tend to show that a passing locomotive caused the fire. A comparison of the evidence in the present record with that considered in the former case discloses no material difference with respect to essential facts, and we say now, as we said then, that the question of whether or not the fire was caused by sparks from a locomotive of defendant was one of fact for the jury to determine.

The second proposition of defendant is based on undisputed facts. The parties stipulated that plaintiff was the owner of the property at the time of the fire; that its value was $2,566.91; that plaintiff carried insurance for the full value with three separate insurance companies; and that each company settled with plaintiff after the fire and before this suit was begun, and paid plaintiff one-third of the entire loss. The pleadings come to us in such form that we shall treat as proved the following allegations: "That after the fire and loss of the aforesaid property, described in the petition, and before the institution of this suit, the afore-

said insurance companies settled said loss in full with plaintiff, and paid plaintiff the following sums in full satisfaction thereof, which together equal the full value of said property, to wit, by said Cosmopolitan Fire Insurance Company the sum of $855.64, by said Ohio German Fire Insurance Company the sum of $855.64, and by said New Jersey Fire Insurance Company the sum of $855.64.

"That thereupon and prior to the institution of this suit, in consideration of the premises, plaintiff executed and delivered its several assignments in writing, whereby it assigned and transferred to each of said insurance companies to the amount and extent of the respective payment aforesaid its supposed claim and cause of action against this defendant for the alleged destruction of said property."

Defendant insists that "plaintiff was not the real party in interest because the settlement of the loss in full worked a transfer of the right of action to the insurance companies, and therefore the plaintiff was precluded from maintaining the action by section 540, Rev. St. 1899 (Ann. St. 1906, p. 575)."

In construing this section and the one following it (section 541, p. 578) the courts of this state have always recognized as sound the doctrine thus expressed in 30 Cyc. 78:

"After some vacillations, the courts of the code states have very generally rejected or refused to adopt the doctrine that beneficial ownership is necessary for a standing as real party in interest, without denying that beneficial ownership is sufficient, in connection with the corresponding cause of action. The prevailing view now entertained by these courts recognizes the legal title also as sufficient. The sounder view is rather that it is enough, to entitle plaintiff to maintain the action as real party in interest, if he has the legal title to the demand, and defendants will be protected in a payment to or recovery by him. A third person, not a party to the action, may, it is true, be entitled to claim from plaintiff a portion of the fruits of the action, or all its fruits, as the case may be; but, as against the defendant, a plaintiff is the real party in interest if he has and shows the complete legal title to the cause of action asserted, so that he can legally discharge the defendant from his obligations."

Plaintiff was entitled to but one satisfaction of its loss,

and, in obtaining full satisfaction for the entire loss from the insurance companies, plaintiff parted with the entire beneficial interest it had in the cause of action created by the wrong of defendant in setting out the fire. The crucial question for our solution is this: Did plaintiff also divest itself of the legal title to the cause of action against defendant by receiving full indemnity for its loss from insurance companies? Should the question be answered in the affirmative, we would hold that plaintiff, shorn of all title, legal or equitable, had no right to prosecute the suit, but, should the question be answered in the negative we would say that plaintiff, as the holder of a bare legal title, may maintain the action for the benefit, however, of the owners of the beneficial interest.

In the discussion of this question, we shall ignore, for the present, the fact that plaintiff executed written assignments to the insurance companies, and shall consider the rights of the parties as fixed by the rules of subrogation.

The liability of defendant as the wrong-doer whose wrong caused the loss was primary and was not released by the indemnification of the injured owner by the assurer whose liability to the owner was somewhat analogous to the liability of a surety. "Whenever the insurer has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent, not at all upon privity of contract, but worked out through the right of the creditor or owner." *Insurance Co. v. Railway Co.*, 74 Mo. App. 106, and cases cited.

In support of its argument that the right acquired by the assurers in the present case included the legal as well as the equitable title to the property—was coextensive with the right of the assured—defendant cites *Allen v. Railway*, 94 Wis. 93, 68 N. W. 873; *Cunningham v. Railway*, 139 N. C. 427, 51 S. E. 1029, 2 L. R. A. (N. S.) 921, and *Railway v. Blunt* (C. C.) 165 Fed. 258. The rule of those cases thus is stated in the case last cited:

"When an insurance company pays to the assured the amount of the loss of the property insured, it is subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. This right of the insurer against such other person is derived

from the assured alone, and can be enforced in his right only. At common law it must be asserted in the name of the assured. In a court of equity or admiralty, or under the modern codes of practice, it may be asserted by the insurance company in its own name when it has paid the assured the full value of the property destroyed—[citing authorities]. But the rule seems to be well settled that, when the value of the property exceeds the insurance money paid, the suit must be brought in the name of the assured. In such action the assured may recover the full value of the property from the wrongdoer, but as to the amount paid him by the insurance company he becomes a trustee, and the defendant will not be permitted to plead a release of the cause of action from the assured, or to set up as a defense the insurance company's payment of its part of the loss. *Hart v. Railroad Company,* 13 Metc. (Mass.) 99, 46 Am. Dec. 719; *Hall v. Railroad Company,* 13 Wall. 367, 20 L. Ed. 594." No doubt we would be disinclined to controvert that rule in a case where the full loss was reimbursed the owner by a single insurer. In such cases we would think there would be a union in the right acquired by the assurer of both the legal and equitable title, and that the assurer alone would be the real party in interest within the meaning of the Code.[1] But in the present case each of the three assurers acted independently of the others, and each by the indemnity it paid acquired nothing more than an equitable interest in the assured's cause of action against the wrongdoer, whose wrongful act was single and indivisible, and gave rise to but one liability.

"If," says Judge DILLON in *Ætna Insurance Co. v. H. & St. J. R. R. Co.,* 3 Dill. 1, Fed. Cas. No. 96, "one insurer may sue, then, if there are a dozen, each may sue, and, if the aggregate amount of the policies fall short of the actual loss, the owner could sue for the balance. This is not permitted, and so it was held nearly 100 years ago in a case whose authority has been recognized ever since both in

[1] The court doubtless means by this statement that such a union of legal and equitable title would take place in the insurer in case there were, as in the case at bar, an *assignment* by the insured to the sole insurer. In the absence of such an assignment the legal title would seem to be in the insured. Thus in Illinois Central R. R. Co. v. Hicklin (1909), 131 Ky. 624, there was full payment by the insurer to the insured of the entire value of the property destroyed, and yet the insured was held to be the real party in interest because he had the legal title.

Great Britain and in this country." *Railway Co. v. Blunt, supra.*

The assignments of the owner's cause of action by operation of the principle of subrogation could confer no greater rights on the respective assignees than might have been conferred by the written assignments of the owner. The defendant did not consent to any assignment of plaintiff's cause of action, and the rule is well settled that, under the rule prohibiting the splitting of a cause of action, a portion of a debt, claim, or judgment is incapable of assignment in the absence of the debtor's consent. *Burnett v. Crandall,* 63 Mo. 410; *Loomis v. Robinson,* 76 Mo. 488; *Beardslee v. Morgner,* 73 Mo. 22; *Pettit v. Insurance Co.,* 69 Mo. App. 320; *Morrison v. De Donato,* 76 Mo. App. 643; *Gordon v. Jefferson City,* 111 Mo. App. 28.

The assignments before us—the written as well as the equitable—whether considered singly or conjointly, had no other effect than to convey to each assurer an equitable interest in plaintiff's cause of action against defendant. The legal title still remained in plaintiff corporation in the name of which the action could be prosecuted. The proceeds of the judgment will come to the hands of plaintiff impressed with a trust in favor of the insurance companies which, in the aggregate, are the owners of the entire beneficial interest.

The judgment is affirmed. All concur.[1]

[1] Compare this case with People's Oil and Fertilizer Co. v. Charleston & Western Carolina Ry. (1909), 83 S. C. 530, *infra,* p. 71, where the insured was held to be a trustee of an express trust.

GREENE v. McAULEY.

Supreme Court of Kansas. 1905.

70 Kansas, 601.

The opinion of the court was delivered by

MASON, J.: F. F. Greene sued A. T. McAuley upon two notes, for $130 each, executed by McAuley to H. E. Stearns, and assigned in writing by Stearns to the plaintiff. Defendant admitted the execution anl assignment of the notes, but

in his answer alleged that they belonged to Mrs. Laura Sims Thomas, and that plaintiff did not own them, and had no right to maintain an action upon them. The case was submitted to a jury upon the issue of the ownership of the notes, and a verdict was given for the defendant. A judgment followed, from which the plaintiff prosecutes error. The principal and indeed the only substantial question involved is whether the evidence given in behalf of the defendant had any tendency to establish a defense.

The plaintiff, while denying that any person except himself had any interest whatever in the notes, contends that the case is controlled by the principle that an action upon a note may be maintained by one who holds the legal title, although without beneficial interest, and that, as he had possession of the notes, and they were assigned to him by the payee, he was entitled to enforce their payment, whatever claim any third person might have had against him with reference to them. The defendant claims that the principle invoked does not apply to the facts of the case. The circumstances out of which the litigation grows are peculiar, and an understanding of the precise question of law presented requires that they be stated in some detail:

In 1895 Greene signed a bond as surety for Mrs. Thomas in a proceeding in error in the Court of Appeals brought to reverse a money judgment rendered against her in the district court. To indemnify him against any loss by reason of his having signed such bond, Mrs. Thomas authorized him to control a quarter section of land owned by her, and to retain the rents for his security until he should be released from liability. Shortly afterwards she made a further agreement with him, in consideration of his advancing her money for the payment of taxes, that, if she should "win" her case in the Appellate Court, she would deed to him an eighth interest in this quarter section. In pursuance of the arrangement described, Greene, in his own name, rented the land for the season of 1897 to Stearns. Stearns sublet it to McAuley, and received from him for the year's rent the two notes sued upon. In October, 1898, a decision was rendered by the Court of Appeals modifying the judgment against Mrs. Thomas by reducing the amount, but not sustaining all her contentions. Greene was relieved from further liability upon the bond, and in the following January he and Mrs. Thomas had a settlement; it being

found that she was indebted to him in the sum of $125, for which she gave him a demand note, which was paid January 31st. So far there is a substantial agreement as to the facts. But there is a radical conflict as to another branch of the settlement referred to. Greene testified that it included an agreement that, in lieu of the one-eighth interest in the land which was to have been deeded to him in the event of Mrs. Thomas "winning" her case in the Court of Appeals, he was to have the rent of the place for 1897, and, as his tenant, Stearns, had sublet to McAuley and taken his notes, that Greene should get these notes from Stearns in satisfaction of the debt owed by Stearns for the year's rent, and should retain them as his own. Mrs. Thomas testified as a witness for defendant that the note for $125 given by her to Greene was in full settlement of all demands whatsoever; that at the time of its execution he agreed that, as soon as this note was paid, he would get the notes from Stearns and give them to her; and that therefore she was the real owner of the notes, and that Greene wrongfully detained them from her. On May 2, 1899, Stearns assigned the notes to Greene in discharge of his liability under his contract to pay rent.

There was evidence that Mrs. Thomas had agreed with McAuley to accept $130 in full satisfaction of both notes. It is not claimed that there was any valid consideration for this agreement, such as to make it enforceable against the owner of the notes; and apparently the evidence was offered, not for the purpose of reducing the amount of any judgment that might be rendered in favor of the plaintiff in this action, but to show wherein the defendant would suffer by being required to make payment to Greene rather than to Mrs. Thomas, and thereby to give him a standing to question Greene's right of recovery. The jury accepted the testimony of Mrs. Thomas, and rejected that of Greene, as is shown by their general verdict and by a number of special findings. The question presented, therefore, is this: Assuming that Mrs. Thomas' statements are true, and that Greene, after promising that he would get the notes from Stearns and give them to her, procured Stearns to assign them to himself, and then wrongfully kept them, having obtained them from Stearns in lieu of the payment of rent which was owing for the use of land belonging to Mrs. Thomas, but which had been made payable to Greene in

order to secure him against a liability from which he had now been released, do these facts constitute a defense in an action brought against the maker of the notes by Greene, not only without the consent, but against the objection, of Mrs. Thomas?

In jurisdictions where, as in Kansas (*Manley v. Park,* 68 Kan. 400, 75 Pac. 557; *Graham v. Troth,* 69 *id.* 861, 77 Pac. 92), the holder of the naked legal title to a promissory note may sue upon it, even although he may be under obligation to account to some third person for the entire proceeds, it is often said that in such an action the defendant cannot challenge the plaintiff's right to maintain it, except by a showing of bad faith in the transaction (*Dyer v. Sebrell,* 135 Cal. 597, 67 Pac. 1036, and cases cited; *City Bank of New Haven v. Perkins,* 29 N. Y. 554, 86 Am. Dec. 332). But in the decisions there is a somewhat singular lack of explanation or illustration as to just what might be considered bad faith, in this connection. Doubtless the phrase is sometimes used with reference to a merely colorable transfer of title by the real owner to a stranger, had for the purpose of embarrassing the maker of the note in his defense. *Marvin v. Ellis* (C. C.), 9 Fed. 367. But this example hardly meets the requirements of the situation, for it is also said that upon a showing that the plaintiff is only a nominal party, acting for the benefit of the real owner of the note sued upon, the defendant may avail himself of any defense that he could have interposed if he had been sued by the latter, and that his rights are protected, not by allowing him to question the plaintiff's capacity to sue, or by requiring the person finally interested to be made a party, but by permitting him to make his defense on the merits against the formal plaintiff. *Cottle v. Cole,* 20 Iowa, 481; *Salmon v. School District* (C. C.), 125 Fed. 235; *Village of Kent v. Dana,* 40 C. C. A. 281, 100 Fed. 56; *Dickinson v. Bull,* 72 Ill. App. 75.

One instance of a transfer in bad faith is presented in *Sheldon v. Pruessner,* 52 Kan. 579, 35 Pac. 201, 22 L. R. A. 709, where its purpose was to defeat the taxation of the note involved. Another is suggested in *Sheridan v. Mayor,* 68 N. Y. 30, where it is said: "It is not a case of mala fide possession which the defendant can avail itself of, as if a thief should bring an action upon a promissory note which

he had stolen." In Daniel on Negotiable Instruments (volume 2, § 1191), it is said:

"If it were shown that the plaintiff, upon suing upon a note payable to bearer or indorsed in blank, has no interest in it, and, in addition, that he is suing against the will of the party beneficially interested, he could not recover, as his conduct would be in bad faith."

In support of this statement the author cites *Towne v. Wason,* 128 Mass. 517, the syllabus to which reads:

"It is a good defense to a promissory note that the plaintiff, although in the possession of the note, has no interest in it, and is prosecuting the action, not for the benefit of the person beneficially interested, but against his objection."

In that case the defense made was that the plaintiff had wrongfully, and without the consent of the owner, obtained possession of the note sued on, which was indorsed in blank; that he had no title to it, and never had had any; and that he was not authorized to sue in behalf of the owner—in effect, that he had stolen the note. And the ground of the decision was that under the facts stated the plaintiff had no authority to receive payment of the note, and a payment to him would not have released the maker. And this suggests what we conceive to be the true rule, of general if not of universal application—that, so far as affects the question of the right of the plaintiff to maintain the action, the only inquiry open to the defendant is whether the plaintiff has such title to the note that a payment made to him would be a complete protection to defendant from any further liability. *Sturgis v. Baker,* 43 Ore. 236, 72 Pac. 744; *Brown v. Powers,* 53 Hun. App. Div. 251, 65 N. Y. Supp. 733; *Hays v. Hathorn,* 74 N. Y. 486. Any investigation which goes further than this merely involves questions between the plaintiff and other claimants of the note or its proceeds, and with these the defendant has no concern. It was said in *City Bank of New Haven v. Perkins,* 29 N. Y. 554, 86 Am. Dec. 332:

"The defendant claims no title to the paper, and does not pretend to have any interest in it, except as a promisor, liable to pay to any proper holder. There is no party before the court who has any legitimate interest in questioning the plaintiffs' title, or who has, as it seems to me, under the circumstances of this case, any right to be heard on that

question. The defendant stands here, therefore, as a mere volunteer, in behalf of others not before the court, and who make no claim on their own account. * * * It will be time enough to determine whether any other person has a better title, when such person shall come before the court to claim the bills in question, or their proceeds, from the plaintiffs."

Applying the test suggested to the present case, the question is, would McAuley have been completely protected in making payment of the notes to Greene? True, according to the contentions of defendant, when Greene settled with Mrs. Thomas he agreed to procure the notes from Stearns and turn them over to her; and nothing was said as to his taking an assignment to himself rather than to Mrs. Thomas. Yet the case is not the same, for instance, as if an agent commissioned to buy negotiable paper for his principal had wrongfully taken title in his own name. For here it required no authority from Mrs. Thomas, to be given at the time of the settlement, for Greene to collect the rent from Stearns, or for Stearns to pay Greene. Stearns, having originally contracted to pay Greene, and not having contracted to pay any one else, might have paid him in cash or by any other method satisfactory to Greene. In fact, he settled his debt by assigning the McAuley notes to Greene—the person to whom, so far as he knew or had occasion to inquire, he was indebted.

The fact that the notes here sued upon were given by McAuley to Stearns for the rent of Mrs. Thomas' land is merely incidental, and has no bearing upon the decision of the controversy. They might be regarded as having been given for any other consideration without affecting the rights of the parties. Greene obtained them in exchange for, or in satisfaction of, a claim of which Mrs. Thomas was the beneficial owner; having been enabled to do so by her voluntarily allowing such claim to be made payable to him. She never acquired possession of, or legal title to, these notes. The effect of the transaction, from her standpoint, was merely to charge Greene as trustee for her benefit with respect to them. The situation presented is closely analogous to that which would have arisen if Mrs. Thomas had assigned and delivered notes originally payable to herself to Greene as collateral security, and he had retained them

after the full satisfaction of the principal obligation, to secure which they had been transferred to him.

It is said by Mr. Randolph in his work on Commercial Paper (volume 3, § 1465), and also in his article on that title in the Cyclopedia of Law & Procedure (volume 7, pp. 1033, 1034), that, as a general rule, the maker of a note should pay to one holding it in pledge only the amount of the holder's debt, and should pay the balance to the owner. Two cases only are cited in support of the text—*Mower v. Stickney,* 5 Minn. 397 (Gil. 321), and *Wofford v. Ashcraft,* 47 Miss. 641. In the former it was held that the maker of a note, who, with knowledge of all the facts, paid it in full to one to whom it had been pledged, but who had suffered it to be taken in execution by a sheriff upon a writ running against the pledgor, was not protected beyond the amount of the pledgee's claim. In the latter both the pledgor and the pledgee of an obligation were parties to an action for its enforcement, and it was held that payment should have been directed to have been made to the pledgee only to the extent of his interest; the remainder to go to the pledgor. In neither case was there a denial that under ordinary circumstances the maker of a note may pay it in full to a holder to whom it has been assigned as security for a debt of a less amount. On the other hand, it is held that one to whom negotiable paper has been assigned as collateral security may, as against the maker, maintain action upon it, even after the full discharge of the debt secured, subject to any defense that might be made against the equitable owner. *Logan v. Cassell,* 88 Pa. 288, 32 Am. Rep. 453; 2 Daniel on Negotiable Instruments, § 1192; 3 Randolph on Commercial Paper, § 1465.

The peculiar feature of the present case is that the equitable owner objects to the holder of the notes exercising further control over them, and his possession, as to her, is wrongful. Of course, the holder of a note unlawfully acquired has no authority to receive payment, or to sue upon it, even although it should bear a genuine indorsement to himself. This might happen, for example, if one holding a note made payable to himself were to sell and deliver it without further assignment, and were then to regain its possession by theft. In such a case he would have neither legal ownership nor rightful possession. A payment made to him would afford no protection, and a showing of the

facts would constitute a good defense to an action brought by him. But where one has rightfully obtained possession of a note, and the legal title is actually vested in him, although he may be under an obligation to transfer it to another, so long as these conditions exist, and no effective measures are taken by the equitable owner to enforce his rights, the payee is justified in dealing with the holder, and a payment made to him is a bar to any further demand. This would apply where the pledgee of paper deposited with him as collateral security retains it after the satisfaction of the debt secured, and it applies here. McAuley would have been completely protected by a payment to Greene, who therefore had capacity to maintain the action.

Just how, in such cases, the interests of other claimants than the holder of the paper involved may be safeguarded, is not a matter for present determination. It has been held that, where an action is brought by the holder, of the legal title to a note, any one beneficially interested in the proceeds may intervene for his own protection. *Gradwohl v. Harris,* 29 Cal. 150; *Illinois Conference v. Plagge,* 177 Ill. 431, 53 N. E. 76, 69 Am. St. Rep. 252. But we are not required to decide whether Mrs. Thomas might have intervened in the present case. There was no necessity for settling in this proceeding any dispute between her and the plaintiff, for their rights with respect to each other remain unaffected by its result. And such intervention was not necessary for the determination of whatever controversy there may have been between Mrs. Thomas and the defendant, because any such controversy could have been effectually litigated without her being a party. Having herself clothed Greene with authority to enforce in his own name the payment of a debt owing to her, and to give full quittance to the debtor, she is concluded by any judgment rendered in a suit brought by him for its collection. *Wetmore v. City of San Francisco,* 44 Cal. 294. Any inconvenience that may result to her from an application of this principle is a risk she assumed in placing him in such a situation that he could maintain the action.

The agreement of Mrs. Thomas to accept a part payment for the whole does not affect the matter. It was supported by no good consideration, and was open to repudiation at any time. It was incapable of enforcement, and could not be made the foundation of any legal right. The plaintiff

was equally entitled to recover the full amount due upon the notes, whether he owned them absolutely, or was required to account for their proceeds as a trustee. Nor was it material that Mrs. Thomas did not countenance the bringing of the action. It may seem something of a hardship that the defendant is not allowed to take advantage of leniency that the beneficial owner of the notes is willing to extend to him, by forgiving a part of the debt or by forbearing to sue upon it. But to cut him off from this privilege is not to deny him any right that the law can recognize. He stands unconditionally charged with the immediate payment of the full amount, and the requirement that he shall respond to this obligation does him no legal wrong.

As the important facts of the case are embodied in the special findings, a new trial is unnecessary. The judgment will be reversed, and the cause remanded, with directions to enter judgment for the plaintiff as prayed for in his petition.

All the Justices concurring.

JEFFERSON v. ASCH.

Supreme Court of Minnesota. 1893.

53 Minnesota, 446.

GILFILLAN, C. J.: The Boston Northwest Real-Estate Company owned a lot on Sixth street, St. Paul, with two buildings standing on it, and let it to George Benz for the term of five years from May 1, 1889, and about a year thereafter he sublet it for the remainder of his term to Smith & Co. Afterwards Smith & Co. entered into a contract with the defendant Leithauser to make certain alterations and repairs and the defendants, Leithauser as principal, and Asch and Boldthen as sureties, executed a bond, in which they acknowledged themselves to be indebted to George Benz, "for the use of the Boston Northwest Real-Estate Company," "and all persons who may do work or furnish material pursuant to said contract, to be paid to

the said George Benz, his executors, administrators, or assigns, for the said use," and which was conditioned to be void if Leithauser should pay "all just claims for all work done and to be done and all materials furnished and to be furnished pursuant to said contract and in the execution of the work therein provided for, as they shall become due, and shall indemnify and save harmless said George Benz and said Boston Northwest Real-Estate Company from all mechanics' liens," etc., and "indemnify and save harmless the said George Benz from all claims of whatever description which may arise from, in, or about said work, alterations, and repairs."

The plaintiffs, having furnished materials to the contractor for the purposes of the contract, bring this action on the bond to recover the price thereof.

The court below sustained a demurrer to the complaint.

From the seals to this bond there arises the presumption of a sufficient consideration to sustain it between the parties to it.

The cases in which one not a party to a contract may sue upon a promise in it for his benefit were at one time limited to contracts not under seal, and this court, in stating the law on the subject, in *Follansbee v. Johnson*, 28 Minn. 311, 9 N. W. Rep. 882, expressed that limitation; but the distinctions in this respect between contracts by specialty and simple contracts has not in the later authorities been adhered to, and may now be regarded as abandoned. If there ever was any reason for the distinction, it could only have been a technical one, which no longer has any merit to commend it, and we do not think we ought to recognize it.

Though this seems intended as a mere bond to indemnify and save the obligee named harmless, that, and not any incidental benefit that might accrue to others not parties to it, being the primary purpose of its stipulations and promises, we will treat it, because on both sides it is so presented here, as though such primary purpose were to secure payment to the persons doing work or furnishing material under the contract mentioned in it. In considering the question presented we must lay aside, as having no bearing upon it, the cases of official or statutory bonds required or authorized for the benefit or security of persons not named as obligee, a nominal obligee being named, and where the statute expressly or by implication author-

izes such persons to sue upon them. Instances of such are sheriffs' bonds, probate bonds, bonds authorized by the mechanics' lien law in Gen. St. 1878, and such as were considered in *City of St. Paul v. Butler,* 30 Minn. 459, 16 N. W. Rep. 362, and *Morton v. Power,* 33 Minn. 521, 24 N. W. Rep. 194.

As, so far as appears by the complaint, Benz could not be liable to pay for the work done and materials furnished in fulfilling the contract to repair, and as, under the law then in force, his interest in the property could not be subject to a lien therefor, it was legally a matter of indifference to him whether the work and materials were paid for or not. He had no duty in respect to it. And the question comes to this: Where, in a contract between two persons one promises the other to do something for the benefit of a stranger to the contract, and the promisee has no relation to the thing to be done nor to the stranger to be benefited, can such stranger bring an action to enforce the promise.

In some of the text-books and decisions it is stated generally "that, where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it." But we do not think there is a case to be found in which such an action was sustained upon a bare promise, with no other circumstances to justify an exception to the general rule that an action upon contract can be maintained only where there is privity of contract between the parties. In *Lawrence v. Fox,* 20 N. Y. 268,—the most conspicuous and thoroughly reasoned case in New York, sustaining an action by a stranger to a contract,—the promisee owed the debt which the promisor agreed to pay, and loaned him the money, which he agreed to pay to the promisee's creditor.

Thorp v. Coal Co., 48 N. Y. 253, was a case where the grantee in a conveyance of real estate assumed to pay a mortgage resting on it to secure a debt of the grantor. In the syllabus to the case it is stated that it overrules *King v. Whitely,* 10 Paige, 465, but, as we read the opinion, it goes no further than to question the reason given by the chancellor in the latter case for sustaining an action in such a case when it can be sustained. The case in 10 Paige was one where the grantee in a conveyance assumed to pay a mortgage on real estate for which the grantor was not personally liable. It was held that the creditor could not

recover of the grantee. The chancellor stated as the principle upon which a creditor can recover from a grantee so assuming to pay a debt of the grantor that a creditor is entitled to be subrogated to securities for the debts held by a surety, and that between the grantor and the grantee in such case the latter becomes the principal debtor and the former surety. Another and simpler reason might have been given, to wit, that where one delivers to or leaves in the hands of another a fund with which to satisfy an obligation of the former, a duty in the nature of a trust is thereby created. The decision in 10 Paige was followed in *Trotter v. Hughes,* 12 N. Y. 74, and approved in *Garnsey v. Rogers,* 47 N. Y. 233.

In *Vrooman v. Turner,* 69 N. Y. 280, similar in its facts to the case in 10 Paige, the court go over the whole ground, recognize the decision in *Lawrence v. Fox,* and hold the two decisions consistent, and follow that in 10 Paige. It lays down this rule: "To give a third party who may derive a benefit from the performance of the promise an action there must be—First, an intent by the promisee to secure some benefit to the third party;[1] and, second, some

[1] This requisite was assumed to be present in the case, as the court expressly states, *supra.* Its necessity is almost universally admitted. In some cases on contractors' bonds, similar to that shown above, it has been successfully contended by the defendant that the intention was to benefit the owner of the building and not the materialmen, and the plaintiff's right to sue has been denied on that ground. Parker v. Jeffery (1894), 26 Ore. 186; Brower Lumber Co. v. Miller (1896), 28 Ore. 565; Montgomery v. Rief (1897), 15 Utah 495; Greenfield Lumber Co. v. Parker (1902), 159 Ind. 571.

On the other hand many such bonds have been construed as made for the benefit of materialmen and laborers. United States Gypsum Co. v. Gleason (1908), 135 Wis. 539; Pickle Marble & Granite Co. v. McClay (1898), 54 Neb. 661; Rohman v. Gaiser (1898), 53 Neb. 474; McDonald v. Davey (1900), 22 Wash. 366.

In a number of cases private property owners have sought to hold water companies liable for the loss by fire of their property on the ground that the companies had not furnished the hydrant pressure called for by their contracts with the cities, but in most of them the plaintiff's right to sue has been denied on the ground that the contract between the city and the company was not made for his benefit: Akron Water Works Co. v. Brownless (1895), 10 Ohio C. C. 620; House v. Houston Waterworks Co. (1895), 88 Tex. 233; Bush v. Artesian Hot and Cold Water Co. (1895), 4 Idaho 618; Eaton v. Fairbury Waterworks Co. (1893), 37 Neb. 546; Wainwright v. Queens County Water Co. (1894), 78 Hun. (N. Y.) 146.

A number of cases against water companies brought by private property owners for loss due to insufficient hydrant pressure, based on the theory of breach of contract with the city, have been decided against the plaintiffs on the ground that there was no duty owing to the plaintiff from the city to provide for fire protection: Howsmon v. Trenton Water Co. (1893), 119 Mo. 304; Mott v. Cherryvale Water Co. (1892), 48 Kan. 12; Becker v. Keokuk Waterworks Co. (1890), 79 Iowa 419. Anerum v. Camden Water, Light & Ice Co. (1908) 82 S. C. 284; German Alliance Ins. Co. v. Home Water Supply Co. (Decided Dec. 2, 1912) ——U. S. ——. See also Houck v. Cape Girardeau Waterworks & Elec. Light Co. (1905), (Mo. App.) 114 S. W. 1099, where the

privity between the two,—the promisee and the party to be benefited,—and some obligation or duty from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally." "There must be either a new consideration, or some prior right or claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement;" and "there must be some legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit." In some cases, near relationship, as of father and daughter, or uncle and nephew, has been held to supply the place of a strictly legal right in the third party. *Dutton v. Pool,* 1 Vent. 318; *Felton v. Dickinson,* 10 Mass. 287,—are instances of such. To enforce such a promise in favor of a third party, where there is no obligation to benefit him on the part of the promisor or promisee, nor anything such as near relationship, nor any consideration from the third party, would be much like enforcing an intended gift or gratuity. *Vroomer v. Turner* settled the law in New York, as the decision, though subsequently referred to with approval (see *Wilbur v. Warren,* 104 N. Y. 193, 10 N. E. Rep. 263; *Litchfield v. Flint,* 104 N. Y. 543, 11 N. E. Rep. 58; *Comley v. Dazian,* 114 N. Y. 161, 21 N. E. Rep. 135; *Lorillard v. Clyde,* 122 N. Y. 498, 25 N. E. Rep. 917; *Durnherr v. Rau,* 135 N. Y. 219, 32 N. E. Rep. 49), has never since been questioned.

The question was considered and the cases in Massachusetts summed up in an able and exhaustive opinion by METCALF, J., in *Mellen v. Whipple,* 1 Gray, 317. That was the case of an agreement by a grantee of real estate to pay a mortgage for which the grantor was not personally liable. It was held the creditor could not recover from the grantee. The court attempts to classify the cases in that state in which one not a party to the promise has been permitted to sue upon it. The classification may be briefly stated as—First, cases where the defendant has in his hands money

court suggests that the Howamon case was in effect overruled by Crone v. Stinde (1900), 156 Mo. 262, but an attempt to get a ruling on the point from the Supreme Court was frustrated by the latter court. 215 Mo. 475. But other courts have permitted such suits: Gorrell v. Greensboro Water Supply Co. (1899), 124 N. C. 328; Paducah Lumber Co. v. Paducah Water Supply Co. (1889), 89 Ky. 340; Lexington Hydraulic Co. v. Oots (1905), 119 Ky. 598; Mugge v Tampa Waterworks Co. (1906) 52 Fla. 371.

which in equity and good conscience belongs to the plaintiff,—as, if A. put money or property in the hands of B. as a fund from which A.'s creditors are to be paid, and B. has promised expressly or impliedly to pay such creditors; second, cases where a near relationship, as father and child, or uncle and nephew, exists between the promise and the person to be benefited; third, cases of which *Brewer v. Dyer*, 7 Cush. 337, is an instance, in which the defendant agreed with a lessee of premises to take the lease and pay the rent to the lessor, and entered with the knowledge of the lessor, paid him the rent for a year, and then left before the term expired.

We have referred so fully to the decisions in New York and Massachusetts because in those states the question has more frequently arisen, and been more ably and thoroughly discussed, than elsewhere in this country.

There has been no decision of this court at variance with the rule as held in those two states. In every case but one the promise was to pay a debt of the promisee, and a fund was either left or put in the hands of the promisor for the purpose. That one case was decided in a line with the rule held in the *Vrooman* and *Mellen Cases*. A grantee of real estate had assumed a mortgage debt for which the grantor was not personally liable. It was held the creditor could not recover from the grantee. *Brown v. Stillman*, 43 Minn. 126, 45 N. W. Rep. 2.

Without undertaking to lay down a general rule defining when a stranger to a promise between others may sue to enforce it, we are prepared to say that, where there is nothing but the promise, no consideration from such stranger, and no duty or obligation to him on the part of the promisee, he cannot sue upon it. Such is this case.

Order affirmed.

VANDERBURGH, J., took no part in the decision.

ENOS v. SANGER.

Supreme Court of Wisconsin. 1897.

96 Wisconsin, 150.

On the 29th day of April, 1893, Casper M. Sanger executed to plaintiffs a mortgage upon certain real estate to secure the payment of $22,500 at the times and with the interest therein provided for. On the 25th day of July, 1893, the mortgagor, by deed with full covenants except as to such mortgage, conveyed such real estate to Emil and Alfred T. Sanger. On the 19th day of August, 1893, the last-named grantees, by a deed with full covenants except as to the aforesaid mortgage, conveyed such real estate to the C. M. Sanger Sons Company. Such deed contained a clause in the usual form, to the effect that the grantee, C. M. Sanger Sons Company, assumed and agreed to pay the said mortgage debt. Default was made in the payment of interest accruing on such debt, and thereupon this action was brought to foreclose such mortgage. The complaint contained the usual prayer for relief to the effect that the decree should provide for personal judgment against all parties personally liable for the mortgage debt in case of a failure to realize a sufficient sum from a sale of the property to satisfy such debt, with interest and costs. All the facts were found as above set forth. The trial court held that the C. M. Sanger Sons Company was not personally liable for the mortgage debt, and thereupon judgment was entered as prayed for in the complaint, except in respect to providing for a deficiency judgment against the C. M. Sanger Sons Company. Plaintiff thereupon appealed from that part of the judgment refusing to provide for such a deficiency judgment.

MARSHALL, J.: The decisions of the various courts are by no means uniform, either in respect to the binding effect of a covenant by a grantee of land to pay the consideration therefor to a third person, or the ground upon which the obligation rests, if sustained. It is useless to review and try to harmonize the various adjudications. In fact, it is difficult to find a line upon which they can be harmonized respecting the ground of the liability. In this state the liability rests upon the doctrine that where one

person, for a valuable consideration, engages with another to do some act for the benefit of a third person, the latter may maintain an action against the promisor for the breach of the agreement. Such doctrine is the settled law in this state. *Bassett v. Hughes,* 43 Wis. 319; *Hoile v. Bailey,* 58 Wis. 434; *Grant v. Lock Co.,* 77 Wis. 72; *Kollock v. Parcher,* 52 Wis. 393; and many other cases that might be cited. All that is required to render such rule applicable is for the obligor, for a sufficient consideration to support the promise, to agree to do some act for the benefit of a third person. No question of subrogation or novation is involved. Such third person, whether sustaining any relation to the person with whom the agreement is made or not, or to the person from whom the consideration moves, may adopt such promise made for his benefit, and thereby bring himself into privity with the obligor, and enforce the promise. While the incidental effect of the execution of such promise is to discharge the debt of another to such third person, such promise is really to pay the debt of the promisor, to perform his own contract, entered into for a sufficient consideration to support it. *Kollock v. Parcher, supra; Hoile v. Bailey, supra.*

In *Bishop v. Douglass,* 25 Wis. 696, the liability of the grantee to pay the mortgage debt was placed on the ground that he received the conveyance subject to a condition, and thereby became bound to perform it, which, as applied to the facts of that case, is only another way of stating the rule before referred to. In *Palmeter v. Carey,* 63 Wis. 426, the liability was based on the same principle, though, as in *Bishop v. Douglass, supra,* the rule was not distinctly stated other than by saying that "the grantee became liable for payment of the mortgage debt by making a valid promise to pay it." In *Brewer v. Dyer,* 7 Cush. 337, the principle is stated in the language of Mr. Justice CRAIG as follows: "Thus, upon the principle of law long recognized and clearly established, where one person, for a valuable consideration, engages with another to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such agreement. It does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases seem to indicate, but upon a broad and more satisfactory basis that the law, operating upon the

acts of the parties, creates the debt, establishes the privity, and implies the promise and obligation on which the action is founded." In most, if not all, jurisdictions, where the liability of a grantee to pay a debt secured upon the property conveyed to him, because of his promise in the conveyance, is sustained on the ground stated, the fact of whether the grantor was liable for the debt or not is held immaterial. *Dean v. Walker,* 107 Ill. 540; *Bay v. Williams,* 112 Ill. 91; *Merriman v. Moore,* 90 Pa. St. 78; *Hare v. Murphy,* 45 Neb. 809.

From the foregoing authorities, which more directly state the doctrine which has long prevailed in this state, applicable to this class of cases, than any case in our own court, and from the general principle upon which such cases rest, which has long been the settled law here, we deduce the following: Where a grantee, in the conveyance to him, assumes and agrees to pay the debt of a third person as part of the consideration for his purchase, there is no necessity for any consideration to pass from such third person or his debtor to such grantee to support such agreement, a portion of the consideration for the purchase being left in such grantee's hands, appropriated by the grantor to the payment of such debt, which debt such grantee agreed to pay in consideration of the conveyance and of such appropriation of the purchase money. He cannot be heard to object to the performance of his contract because his grantor was not liable to such third person.

When the grantor makes such an appropriation, and the grantee, for a sufficient consideration, promises to pay the amount so appropriated to the third person, such grantee thereby becomes liable to such third person, and such liability rests solely on such consideration and such promise.

BY THE COURT: The judgment of the Superior Court is reversed, and the cause remanded for further proceedings in accordance with this opinion.[1]

[1] *Promisee also may sue.* "It is to be observed that, while code, section 3459, requires that every action be brought in the name of the real party in interest, and that under this provision it has been held that the party for whose benefit a contract has been made may sue for breach thereof, there is no statutory provision which deprives the person to whom, on a consideration proceeding from himself, a promise is made to pay or deliver property to a third person, presumably for the ultimate benefit or advantage also of the party furnishing the consideration, of a right to maintain an action in his own name for damages resulting to him for breach of the contract by the other party." Dorr Cattle Co. v. Jewett (1902), 116 Iowa 93.

GISELMAN v. STARR.

Supreme Court of California. 1895.

106 California, 651.

HENSHAW, J.: The appeals are from the judgment and from an order denying a new trial.

Action by plaintiffs, as executors of the last will of S. C. Hastings, deceased, to reform, and, as reformed, to foreclose, a mortgage executed by defendant.

Starr executed the note and mortgage in suit to William Giselman, trustee, in payment and cancellation of an existing note, also secured by mortgage, made by him to S. C. Hastings. A few days thereafter, Giselman indorsed the note, "Pay to the order of S. C. Hastings, without recourse. William Giselman, Trustee,"—and delivered it to Hastings. At the same time he executed, as trustee, an assignment to Hastings of the mortgage. These papers, upon the death of Hastings, coming into the hand of the executors, of whom Giselman is one, this action was in due time commenced.

The defendant meets it by answer and cross complaint, whereby he claims that he executed the note and mortgage to Giselman as trustee for the use and benefit of the daughters of said Hastings; that, at the time of the assignment to Hastings, he knew this fact, and, so knowing, took the note and mortgage without consideration; that thereafter Ella Hastings, daughter of S. C. Hastings, acquired by gift all of the interest of S. C. Hastings in the note and mortgage; and that the action is not prosecuted by the real parties in interest. The named beneficiaries of the trust and the widow of S. C. Hastings are interpleaded as having or claiming some interest in the mortgage and note, and are brought in under averments that, without a determination of their rights, defendant cannot tell to whom to pay the amount found due, nor with safety redeem in the event of a sale.

* * * * * * * * * * *

3. The defendant has a statutory right to have a cause of action against him prosecuted by the real person in interest (code civ. proc. § 367); and it was in the exercise of

that right that he pleaded lack of title in plaintiffs, and asked to have determined the conflicting claims of those whom he asserted to be the owners. But the purpose of the statute is readily discernible, and the right is limited to its purpose. It is to prevent a defendant against whom a judgment may be obtained from further harassment or vexation at the hands of other claimants to the same demand. It is to prevent a claimant from making a simulated transfer, and thus defeating any just counterclaim or set-off which defendant would have to the demand if pressed by the real owner. But where the plaintiff shows such a title as that a judgment upon it satisfied by defendant will protect him from future annoyance or loss, and where, as against the party suing, defendant can urge any defenses he could make against the real owner, than there is an end of the defendant's concern, and with it of his right to object; for, so far as he is interested, the action is being prosecuted in the name of the real party in interest. The cases which seemingly lay down the broad rule that it is not a good plea to allege that the note sued upon is the property of another, and not of plaintiff, without showing some substantial matter of defense against the one asserted to be the owner, are to be read in the light of their facts, and so read they will be found to be in strict accord with what is here said. They are cases where *prima facie* legal title is shown in plaintiff, such a title as would protect defendant if judgment were obtained upon it. If, under such circumstances, the defendant claims another to be the real owner, he must support his right to make that claim by showing that he has some equity or defense against the real owner which he cannot maintain against the *prima facie* legal owner. Such is the meaning of *Price v. Dunlap*, 5 Cal. 483, and *Gushee v. Leavitt*, Id. 160.

In the case under consideration the plaintiffs are *prima facie* legal owners, as executors, of the note and mortgage. Defendant is fully protected against those whom he names as owners and claimants by the judgment in favor of plaintiffs, and, in addition, he neither pleads nor shows any defense or set-off which he could make against the real owner, were Ella Hastings declared to be such. Therefore, by satisfying the present judgment, defendant is discharged from liability to all of the alleged conflicting claimants;

and, since he does not dispute the debt nor its amount, this is all that in equity he can ask or should desire.[1]

* * * * * * * * * * *

[1] *Accord:* Lodge v. Lewis (1903), 32 Wash. 191; Sturgis v. Baker (1903), 43 Ore. 236; Elmquist v. Markoe (1891), 45 Minn. 305; Hays v. Hathorn (1878), 74 N. Y. 486; Illinois Cent. R. R. Co. v. Hicklin (1909), 131 Ky. 624; Los Robles Water Co. v. Stoneman (1905), 146 Cal. 203; Greene v. McAuley (1905), 70 Kan. 601 (*supra*, p. 42); Hankwitz v. Barrett (1910), 143 Wis. 639; Brown v. Powers (1900), 53 N. Y. App. Div. 251; Pullman v. Pullman (1910), 81 Kan. 521.

(b) Trustee of an Express Trust.

CONSIDERANT v. BRISBANE.

Court of Appeals of New York. 1860.

22 New York, 389.

Appeal from the judgment of the Superior Court of New York city, sustaining a demurrer to a complaint, which alleged, in substance, that the European and American Colonization Society in Texas was a corporation duly created by and existing under the laws of Belgium, in Europe, of which said corporation the business name was Bureau, Guillon, Godin & Co.; that the defendant, on or about the 1st of March, 1855, at the city of New York, applied to the plaintiff (acting as the executive agent, and, as such agent, authorized to receive subscriptions to the stock of the said company), and authorized the said plaintiff to subscribe the name of the said defendant in the books of the said company, as an original subscriber for the stock of said company, known as premium stock, to the amount of $10,000, which the plaintiff then and there undertook and faithfully promised to do; that the said defendant then and there made and executed, in writing, two subscription notes, or contracts, for the payment, in the aggregate sum of $10,000, for the shares so taken by the said defendant in said company, and delivered them to the plaintiff, which said notes were in the words and figures following, to wit:

(1.) NEW YORK, March 1st, 1855.

"$5,000.

"On the first day of July, 1856, I promise to pay V. Considerant, as executive agent of the company, Bureau, Guillon, Godin & Co., the sum of five thousand dollars, for which I am to receive stock of said company, known as premium stock *(actions à prime)*, to the amount of $5,000.

"A. Brisbane."

(2). "NEW YORK, March 1st, 1855.

"$5,000.

"On the first day of September, 1856, I promise to pay to V. Considerant, as executive agent of the company, Bureau, Guillon, Godin & Co., the sum of $5,000, for which I am to receive stock of said company, known as premium stock *(actions à prime)*, to the amount of $5,000.

"A. BRISBANE."

That said plaintiff, acting as such executive agent, and under and by virtue of the authority vested in him by said defendant as aforesaid, duly caused the name of the defendant to be entered on the books of the said company, at Brussels, in Belgium, for the amount of stock so subscribed for by him, and caused certificates, in the usual form issued by said company, to be issued in the name of said defendant; that the plaintiff has always been ready and willing to deliver to the defendant the certificates of said company of the shares, or interest, so subscribed for by the defendant as aforesaid, or intended so to be, and, on the maturity of each of said notes, caused the same to be tendered to the defendant, on the payment by the defendant of the sum agreed to be paid by him for the same, and said plaintiff is still ready and willing so to do; but the defendant has hitherto wholly neglected and refused to pay the sum so agreed to be paid by him as aforesaid, and still wholly neglects and refuses so to do, to the damage of the plaintiff of $10,000 and upwards; wherefore, the plaintiff demands judgment, etc.

The defendant demurred to the complaint, assigning as the ground therefor that it did not state facts sufficient to constitute a cause of action.

The Superior Court sustained the demurrer, on the ground that the action could not be maintained by the plaintiff; and the plaintiff appealed to this court. The cause was submitted on printed arguments.

WRIGHT, J.: It is conceded, as it must be, that the complaint states a cause of action in the corporation, for whom the plaintiff acted as executive agent, against the defendant. The defendant subscribed for $10,000 of the stock of the company, through its agent, and agreed and promised in writing to pay $5,000 of the sum on the 1st of July, 1856, and the remaining $5,000 on the 1st of September, 1856. The company, and not the plaintiff, was the party beneficially interested, and the duty, or obligation, to issue the stock (which was the sole consideration for the defendant's agreement and promise), rested upon, and could only be performed by, such company. Had the corporation, on the 1st of July, or the 1st of September, refused to issue the stock, no action could have been maintained by anybody on the instrument executed on the 1st of March, 1855, by the defendant, and set out in the complaint. On the other hand, the defendant's remedy would be against the corporation, and not against the person professedly acting as its agent. Thus the corporation had the exclusive beneficial interest in the subject of the defendant's promises. The plaintiff was not personally bound by the contract; and the corporation was bound, unless the contract was a *nudum pactum*. The averments of the complaint excluded any other construction than that the plaintiff acted in the transaction as the agent of the company; and if we look exclusively to the subscription notes, and interpret the defendant's promises from what appears on the face thereof, it is clear that the official character of the plaintiff was alone in the mind of the promisor and contemplated in the promise, and that such promises were not to him personally, but in his official or representative capacity.

The facts stated, therefore, in the complaint, showed the corporation and the defendants to be the parties in whom the interest in the contract vested, and the plaintiff, who made the contract, having no beneficial interest in it, nor bound by it, nor furnishing any part of the consideration for it. The single question is, whether the plaintiff may maintain an action for the breach of it.

The code provides that "every action must be prosecuted in the name of the real party in interest," except that "an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is

prosecuted." (Code, secs. 111, 113.) And it is declared, that "a trustee of an express trust, within the meaning of the section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." (Sec. 113.)

It is plain that the plaintiff is not the real party in interest; but the question remains, is he "a trustee of an express trust," within the definition of that term in section 113 of the code? Is he "a person with whom, or in whose name, a contract is made for the benefit of another?" As such, he would be authorized to sue on the subscription notes in his own name, notwithstanding the beneficial interest was in his principals.

The subscription notes, or contracts, purported on their face to be made with the plaintiff as executive agent of the foreign company, and the promise was to pay him, as such agent, the sums of money named therein, for which the defendant was to receive the stock of the company. They were not contracts, therefore, directly with the principals, with a promise to pay the plaintiff for their benefit. On such a case, no action could be maintained by the promisee, though the promise might support an action by the company. They were, rather, express contracts to pay the plaintiff for the use of, and on a consideration moving from, the company. Before the code, I think a contract of this character would have raised such a legal interest, by way of trust, as that an action might have been maintained by the plaintiff. In cases of written contracts, the right of action followed the legal title. This title was in the party entitled to the performance of the contract; and the party entitled in law was the one to whom, by its terms, it was to be performed, or his assignee, if assignable. Written express contracts, by or with agents contracting in their own names, with or without a description of agency, were not exceptions to the rule. Such a contract was with an agent, and in his name, when executed by or to him in his individual name, without expressing the agency, though the other party knew he was acting as agent in the transaction, and contracted with him in that capacity; and it was equally with him, and in his name though he was described as agent on its face, when negotiated with him, and by its terms to be performed by or to him. The words expressive of the agency might, if necessary for the convenience of the rem-

edy, be rejected as a mere description of the person. The payee of a note, although received by him as agent for another, might sue upon it in his own name. (*Buffum v. Chadwick,* 8 Mass. 103.) So, when a bill of exchange was indorsed to "S. S. F., cashier," he might maintain an action upon the bill in his own name, notwithstanding he might be obliged to account to the bank of which he was cashier. (*Fairfield v. Adams,* 16 Pick. 381.) In *Sargent v. Morris* (3 Barn. & Ald. 277), BAYLEY, J., stated the rule as follows: "If an agent acts for me and on my behalf, but in his own name, then, inasmuch as he is the person with whom the contract is made, it is no answer to an action in his name to say that he is merely an agent, unless you can also show that he is prohibited from carrying on that action by the person on whose behalf the contract was made." When there was an express promise in writing to an agent, the action might be in the name of the agent. To hold otherwise, as was said by BRONSON, J., would be to declare the contract nugatory, except where it was in the form of negotiable paper which could be transferred to the principal, so as to enable him to sue in his own name. (*Harp v. Osgood,* 2 Hill, 216.) In the present case, before the changing of the rule, I cannot well perceive how the company, who had the exclusive beneficial interest, while the express promise was to pay the plaintiff, and who had, therefore, the legal interest by way of trust, could have maintained an action at law in its own name to recover the money. Undoubtedly, when a contract has been made directly with the principal, by a mere agent having no beneficial interest in it, such agent—the case of a factor being, to some extent, an exception—could not support an action thereon. Where A, having a general power of attorney to collect debts, etc. in the name and for the use of B, delivered a contract to an attorney to collect, who gave him a receipt for it generally, as for collection, it was held that A could not maintain an action in his own name against the attorney for money collected by him on the contract so put into his hands. (*Gunn v. Cantine,* 10 John. 387.) But, though the agent in that case had no beneficial interest in the contract, it was admitted that he might have sued in his own name if there had been an express promise to pay the money to him. (*Harp v. Osgood, supra.*) Where the contract was express to pay A for the use of B, on con-

sideration moving from B, it raised such a legal interest by way of trust as would maintain an action in A's name, though A may have acted as the agent of B, with or without disclosing his agency. In such a case, to entitle the agent to sue in his own name, it was not necessary that the beneficial interest should be in him, or that the consideration should proceed from him. Nor was it required that he should himself be personally liable on the contract, as a right to sue as trustee could exist without any pretence of a personal liability.

Prior to the code, therefore, I am of the opinion that the plaintiff might have maintained an action on the express contracts set out in the complaint for the benefit of his principals, having a legal interest in them by way of trust. The promise being to him in writing for the benefit of another, he would have been deemed the party "with whom, or in whose name," the contracts were made, and in whose name alone the promise could be enforced in a court of law. The code, however, abrogated the common law rule, that the right of action followed the legal title, and made the beneficial interest the sole test of the right. In adopting the latter rule, it was easily to be seen that there were a class of cases in which it would be extremely prejudicial to the remedy, as well as difficult of application, viz., the case of executors, persons authorized by statute to sue, and trustees of an express trust. To obviate this, it was especially provided that, in these cases, the executor, or statutory party, or trustee of an express trust, might sue without joining with him the person for whose benefit the action was prosecuted. (Code, sec. 113.) The term, "trustee of an express trust," had, however, acquired a technical and statutory meaning. Express trusts, at least up to the adoption of the Revised Statutes, were defined to be trusts created by the direct and positive acts of the parties by some writing, or deed, or will; and the Revised Statutes had abolished all express trusts, except as therein enumerated, which related to land. If the 113th section of the code was to be confined and limited to those enumerated as express trusts, the practical inconvenience arising from making the beneficial interest the sole test of the right to sue, and which that section was intended to obviate, would continue to exist in a large class of formal and informal trusts. Accordingly, in 1851, the section was amended by

adding the provision that "a trustee of an express trust, within the meaning of the section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." It is to be observed that there is no attempt to define the meaning of the term "trustee of an express trust," in its general sense; but the statutory declaration is, that those words "shall be construed to *include* a person with whom, or in whose name, a *contract* is made for the benefit of another." The counsel for the respondent insists that the sole intention of the legislature, in amending the section, was to remove a doubt that had been expressed, whether a factor or other agent who had, at common law, a right of action on a contract made for the benefit of his principal (by reason of his legal interest in the contract), was, by the code, deprived of that right. But no such limited intention can be inferred from the words of the statute. Indeed, it is only by a liberal construction of the section that the case of a contract by a factor (an individual contract) can be brought within it at all. It is indeed, manifestly, to embrace, not only formal trusts, declared by deed *inter partes*, but all cases in which a person, acting in behalf of a third party, enters into a written, express contract with another, in his individual name, without description, or in his own name, expressly in trust for, or on behalf of, or for the benefit of, another, by whatever form of expression such trust may be declared. It includes, not only a person with whom, but one in whose name, a contract is made for the benefit of another. The contracts set out in the complaint are within its terms. They are made in the name of the plaintiff, for the benefit of the Belgian corporation. The subscription notes are payable to the plaintiff by name, as "executive agent" of principals named, and are, therefore, contracts made with him for the benefit of another, and in a representative capacity necessarily involving a trust. The court below assumed the ground that, where the promisee, though named in the contract, was mentioned only in respect of his official, or representative character, and not as promisee individually, the promise would not be deemed made to him; and, hence, such a case would not be embraced within section 113. This cannot be the true construction of the statute. If the promise be to a person described as agent, and it appears upon the face of the writing, expressly or

by implication, that it was made for the benefit of another, it is within the intention, and, I think, the terms, of the enactment. It could hardly have been the intention, as contended for by the counsel of the respondent, to include a contract which did not, on the face of it, in terms or by implication, declare or disclose a trust, in the category of "express trusts;" whilst one, expressing the trust on its face, was to be excluded. The obvious policy of the legislature was to reserve the right of action in all cases of express trusts, whether the instrument in terms declared the trust, or by necessary implication disclosed it. In this case, if the words, "as executive agent," are to be treated as a mere description of the person, then the promise was to the plaintiff individually; but if the plaintiff is to be considered as acting in a representative capacity, they are contracts made with him in that capacity for the benefit of another, and necessarily involving a trust. Indeed, the terms "executive agent" indicate an active trust. Had the subscription notes on their face been made payable to the plaintiff "in trust for the company," etc., no one would doubt of their falling within the statute. In legal effect, the contracts as much involve a trust as though the same was declared in words.

The court below reached the conclusion that, though the plaintiff's name was contained in the contract, it was accompanied by such a designation of the representative character in which he was named as promisee that the promise was, in judgment of law, made to the principal and not to himself; and that, in such cases, the contract could not be said to be made in his name. It is assumed that the written contract in this case was made, in legal effect, with the principals, by the plaintiff acting as their mere naked agent, and, in a legal sense, cannot be said to be made with or in the name of the plaintiff. It would follow, from such an assumption, that, neither before nor since the code, could the plaintiff sue thereon. This, however, is an incorrect view. Before the code, I think, the remedy at law, upon an express contract of this character, must have been enforced in the name of the plaintiff; but that if there was any doubt upon this subject, the plaintiff clearly falls within that description of person who, by the 113th section of the code, shall be construed to be a "trustee of an express trust," and, as such, authorized to sue. Since the adoption of the

general rule, that actions, either of a legal or equitable nature, must be prosecuted in the name of the real party in interest, the person for whose benefit the action was prosecuted might be joined with the trustee; but section 113 expressly authorizes suits to be maintained by the trustee alone.

Upon the whole, I am of the opinion that the action may be prosecuted in the name of the plaintiff, and that the demurrer cannot be sustained. The judgment of the Superior Court should be reversed, and that of the special term affirmed.

SELDEN, DAVIES, CLERKE and WELLES, Js., concurred.

DENIO, J. (Dissenting). * * *

* * * * * * * * * * *

COMSTOCK, Ch. J., and BACON, J., concurred in this [dissenting] opinion.

Judgment at general term reversed, and that at special term affirmed.[1]

[1] Either the trustee or the person for whose benefit the contract is made may sue: Horseshoe Pier Amusement Co. v. Sibley (1910), 157 Cal. 442. The right of the former is permissive only; Anglo-Californian Bank v. Cerf (1905), 147 Cal. 384.

In Chapman v. McLawhorn (1909), 150 N. C. 166, plaintiffs were selling agents of a manufacturing company, "on a *del credere* commission—that is, the agents guaranteed payment on all sales, and were to turn over all notes and accounts, when called for." The agency contract also provided that after sale, the cash, notes, accounts or other proceeds of sale were to be the property of the company. It was held that plaintiffs were not the real parties in interest and could not sue on an account for goods sold defendant.

MITCHELL v. ST. MARY.

Supreme Court of Indiana. 1897.

148 Indiana, 111.

HACKNEY, J.: This was a suit by the appellant, John Mitchell, upon four promissory notes, and to foreclose a mortgage of certain real estate securing said notes. * * *

* * * * * * * * * * *

The facts specially found were that the Lake View Cemetery Association was, at the time of the transactions under

investigation, a corporation, of which appellant was treasurer, and had custody of its moneys, with the duty of lending the same; that in June, 1894, Cain indorsed the notes described, in blank, and gave one Campbell authority to dispose of them; that Campbell sold them to said association, said Mitchell paying its money therefor, and said notes, with said indorsement, were delivered to Mitchell as such treasurer, and as the property of said association and not otherwise; that on said date Cain assigned said mortgage to Mitchell, but that Mitchell received the same and the notes as the property of the association; that Mitchell never claimed any title to or interest in said notes and mortgage, or the proceeds thereof, but the same were by him entered upon the books of the association to its exclusive credit, and it was and still is the owner thereof. It is found also that Mitchell had never held said notes, excepting as treasurer and the mere custodian of the association; that he was never authorized to sue upon said notes in his own name, but prosecutes the suit without the knowledge or direction of the association, and without any right so to do.

The conclusion of law was that Mitchell had no right to maintain the suit. It is apparent that the court went fully into the question of right or authority of the appellant to prosecute the suit in his own name, and that there was a finding upon every fact pleaded in the affirmative replies. Section 251, Rev. St. 1894 (section 251, Rev. St. 1881), provides that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided in" section 252. The exception there said to be applicable is that "a trustee of an express trust * * * may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another."

* * * * * * * * * * *

The facts specially found, instead of disclosing that the appellant was the trustee of an express trust, disclose that he was a mere agent for the custody of the paper, not named in the paper as trustee, and acting in the suit with neither authority nor consent of the association, and that his own name was connected with the transaction without

an intention to make him a trustee. Cases in point are: *Swift v. Ellsworth,* 10 Ind. 205; *Rawlings v. Fuller,* 31 Ind. 255.

The cases of *Heavenridge v. Mondy,* 34 Ind. 28; *Wolcott v. Standley,* 62 Ind. 198; *Holmes v. Boyd,* 90 Ind. 332; *Rinker v. Bissell,* Id. 375; *Landwerlen v. Wheeler,* 106 Ind. 523, and the class to which they belong, have no force in this case, since they disclose contracts from which a trust relation affirmatively appears, or where the suit is to enforce the demand as one of a trust character. There must be something in the nature of the contract, appearing upon its face or from allegations in the pleadings, disclosing that a trust relation exists and is sought to be enforced for the benefit of the *cestui que trust.* It is not enough that an agent who exceeds his authority in suing in his own name upon a demand due his principal is an agent, and may intend to account for the recovery. He cannot bind his principal without authority expressed or implied, and it is only when the principal may be deemed to be in court, and bound by the proceeding, that section 252, Rev. St. 1894 is intended to apply.

There was no error in the action of the trial court, and the judgment is *affirmed.*

PEOPLE'S OIL AND FERTILIZER COMPANY v. CHARLESTON AND WESTERN CAROLINA RAILWAY.

Supreme Court of South Carolina. 1909.

83 South Carolina, 530.

October 12, 1909. The opinion of the court was delivered by

Mr. Chief Justice JONES: The seedhouse and contents, including machinery, of the People's Oil & Fertilizer Company at Anderson, S. C., was destroyed on February 11, 1907, by fire alleged to have been communicated by defendant's locomotive engine, or to have originated within the limits of defendant's right of way, in consequence of the

acts of its authorized agents or employes. The property was insured under policies issued by the Phoenix Assurance Company, Limited, the Scottish Union & National Insurance Company, and the Cotton Seed Oil Millers' Insurance Bureau in certain specified amounts, respectively, and the loss as adjusted was paid to plaintiff by the companies, and it is alleged that each insurance company became subrogated to the rights of the insured plaintiff as against the defendant to the extent of the payment made by it. The plaintiff also claimed to have sustained a loss by such fire over and above the aggregated amount received by it from the insurance companies to the extent of $2,758. Demand was made upon defendant to pay said losses, and, upon its refusal, this action was brought by plaintiff to recover in its own behalf the sum of $2,758, its alleged loss over the aggregate insurance received, anl as trustee of Phoenix Assurance Company, Limited, for $3,200 paid by it on its policy, as trustee of Scottish Union & National Insurance Company for $3,200 paid by it on its policy, and as trustee of Cotton Seed Oil Millers' Insurance Bureau for $1,250 paid by it on its policy.

* * * * * * * * * * *

The provisions of section 132 of the code of civil procedure of 1902, providing that "every action must be prosecuted in the name of the real party in interest," is expressly limited by the provision in section 134 that "* * * a trustee of an express trust * * * may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another."

One of the subrogation receipts introduced in evidence, after acknowledging receipt of the insurance money for the loss covered by the policy, concluded as follows: "Do hereby assign, set over, transfer and subrogate to the said Scottish Union & National Insurance Company, all the right, claims, interest, choses or things in action, to the extent of thirty-two hundred dollars, paid us as aforesaid, which we may have against said C. & W. C. Ry. Co., or any other party, person or corporation, who may be liable, or hereafter adjudged liable, for the burning or destruction of said property, and hereby authorize and empower the said

Scottish Union & National Insurance Company to sue, compromise or settle in our names, or otherwise to the extent of the money paid as aforesaid, and it is hereby fully substituted in my stead, and subrogated to all rights in the premises. It being expressly stipulated that any action taken by said company shall be without cost or charge to us. People's Oil & Fertilizer Co., per Jo. J. Fretwell, President."

The other receipts were of similar import. This answers the requirement of an express trust, as there is an express agreement as to the existence and purpose of the trust relation, or what is equivalent to such agreement in law. Notwithstanding the words of assignment, the manifest purpose is to subrogate the insurance company to a limited extent to the rights of the plaintiff. Plaintiff still has legal title to the cause of action, subject to the equitable right of subrogation. The cause of action lies in tort, and is really single. It is conceded that this action would have been maintainable under the law existing before the adoption of the code. *Insurance Company v. Railway Co.*, 41 S. C. 410, 19 S. E. 858. If plaintiff, as held in the case above, was trustee for the insurance companies to the extent of the insurance paid by them, then there is nothing in section 132 of the code to prevent the action in this form.

It may be conceded that the insurance companies may have been joined in the suit, or may have sued in their own behalf as in *Insurance Co. v. Railway*, 76 S. C. 103, 56 S. E. 788, still the trustee had the right to sue without joining with him the beneficiaries of the trust. In either case the court would guard the defendant from liability to be subjected to pay the same loss twice.[1]

* * * * * * * * * *

[1] Compare this case with Swift & Co. v. Wabash Rd. Co. (1910), 149 Mo. App. 526, *supra*, p. 37, where the insured was held to be the real party in interest.

As holding that the insurance company might also sue as real party in interest, see also Travelers' Ins. Co. v. Great Lakes Engineering Works Co. (1911), 107 C. C. A. (Ohio) 20, where the loss had been paid in full under a contract of employer's liability insurance.

COUSAR v. HEATH, WITHERSPOON AND COMPANY.

Supreme Court of South Carolina. 1908.

80 South Carolina, 466.

July 8, 1908. The opinion of the court was delivered by Mr. Justice GARY: This action was commenced, on the 7th of December, 1905, to recover a loss of $300, sustained by the plaintiff, John G. Cousar, as the result of certain transactions between him and the defendants relative to the future delivery of cotton.

The allegations of the complaint, material to the questions presented by the exceptions, are as follows:

"That on November 13, 1905, the plaintiff contracted with the said Heath, Witherspoon & Co., through their agent, Henry Samuels, and purchased 100 bales of cotton for future delivery, to wit, January, 1906; that on November 15, 1905, the plaintiff contracted with Heath, Witherspoon & Co., by and through their agent, Henry Samuels, and sold 100 bales of cotton for future delivery, to wit, May, 1906; that the plaintiff paid the defendants herein $300, to wit; $150 on November 13, 1905, and $150 on November 18, 1905, in cash, as margins to cover any loss that might be sustained by the plaintiff, by reason of his said contracts, for the future delivery of cotton.

"That the defendants herein have closed out plaintiff's contracts contrary to plaintiff's directions and instructions, and at a market price, for such future deliveries, causing plaintiff to lose the margins paid thereon. * * *"

* * * * * * * * * * *

On the 7th of November, 1906, the circuit judge made an order permitting the plaintiff to amend his complaint by adding the name of T. J. Cunningham as a party plaintiff, with leave to the defendants to answer the amended complaint as they might be advised. The defendants answered the amended complaint, denying certain allegations thereof, but did not set up any defense.

* * * * * * * * * * *

The first question that will be considered is whether the circuit judge erred in allowing the plaintiff John G. Cousar

to amend his complaint by adding the name of T. J. Cunningham as a party plaintiff.

The plaintiff Cousar testified as follows: "By Mr. Gastion: Q. Mr. Cousar, just state the full facts about how this transaction was had. Were the receipts and telegrams and other papers between you and Mr. Samuels in your name? A. Yes, sir; everything was in my name. Q. The written evidence and contract was in your name? A. Yes, sir. Q. Who advanced the money? A. I did. Q. How did Mr. Cunningham reimburse you? A. Well, sir, we settled later. Q. So you were the one actively managing the contract? A. Yes, sir. Q. And the papers were all in your name? A. Yes, sir."

The plaintiff Cunningham testified as follows: "Q. Well, now, were the receipts, and the evidence of it, in your name at all? A. Oh, no; Mr. Cousar managed that entirely. Q. And was he the man that issued the orders and dealt with Mr. Samuels? A. Yes, sir. Q. Did you give any orders contrary to Mr. Cousar? A. I did not, and would not have done so. Q. The management of the contracts was in whose hands? A. Mr. Cousar's entirely."

"Section 134, code Civ. Proc. 1902, is as follows: "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another."

The testimony shows that Cousar was a person for whom, or in whose name, a contract was made, not only for himself, but for the benefit of another. He was therefore a trustee of an express trust, and had the right to sue without joining the other person for whose benefit the action was prosecuted.

The result of the action would have been just the same, even if the complaint had not been amended; and the defendants have no just ground to complain that the amendment was prejudicial to their rights.

* * * * * * * * * * *

(c) Person Expressly Authorized by Statute.

OATES v. UNION PACIFIC RAILWAY COMPANY.

Supreme Court of Missouri. 1891.

104 Missouri, 514.

BLACK, J.: The petition discloses these facts: The defendant, the Union Pacific Railway Company, owns and operates a railroad in the state of Kansas, which extends into this state. The defendant's servants carelessly and negligently ran a train of cars upon J. M. Oates, at a point in the state of Kansas, inflicting injuries upon him from which he died the next day, namely, the 9th of June, 1885. Oates, was not in the employ of the defendant at the time he was injured, but he was in the employ of another railroad company. At and prior to his death he resided in this state, and he left surviving a widow and three minor children. Plaintiff, who is the widow of the deceased, brought this suit in the courts of this state for the death of her husband, laying her damages at the sum of $10,000, and founding her cause of action upon the statute laws of the state of Kansas, which are set out in the petition.

The Circuit Court sustained a demurrer to the petition, and the sole question before us is whether the plaintiff can maintain this suit in the courts of this state.

* * * * * * * * * * *

The statute of the state of Kansas, set out in the petition, is in these words: "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter if the former might have maintained an action, had he lived, against the latter for the same act or omission. The action must be commenced within two years. The damages cannot exceed $10,000, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." * * *

As we have said, the plaintiff founds her cause of action upon the statute of the state of Kansas. According to that statute, the cause of action accrued to the executor or ad-

ministrator of the deceased person. It is true the damages, not to exceed $10,000, inure to the benefit of the widow and children or next of kin, to be distributed in the same manner as personal property of the deceased is distributed in that state. But the executor or administrator is the only person who can sue for and recover the damages. The plaintiff in this case could not maintain the suit in that state. Though the cause of action is based upon a statute of that state, and though the present plaintiff could not prosecute the suit in that state, yet we are asked to say she may prosecute it in this state. This we cannot do. Says Mr. Wood: "It is needless to say that actions under these statutes must be brought by the persons designated therein, and within the time and in the manner provided. If the statute provides that the action shall be brought by the executor or administrator of the deceased, *no other person can maintain an action.*" 3 Wood, Ry. Law, § 413. The statute gives the cause of action, and points out the persons who may sue, and they, and they alone, can sue, and they must sue within the time prescribed by the statute. *Barker v. Railway Co.*, 91 Mo. 86, 14 S. W. Rep. 280. The fact that by the statute of this state the widow, under the circumstances detailed in the petition, could sue for and recover the fixed sum of $5,000, does not aid the plaintiff, for our statute has no extraterritorial operation. As the plaintiff could not prosecute this suit in that state, she cannot prosecute it in this state. This we think too clear to admit of any doubt. If by the laws of that state she could prosecute the suit, then a different question would be presented for our consideration.

On behalf of the plaintiff, it was argued at the bar of this court that an administrator appointed in this state cannot prosecute this suit in the courts of Kansas, and so it has been held in *Limekiller v. Railroad Co.*, 33 Kan. 83, 5 Pac. Rep. 401, that no administration can be granted upon the estate of the deceased in the state of Kansas because he had no property in that state; that plaintiff cannot maintain this suit in that state; and that she is therefore without remedy, unless she is allowed to prosecute the present action in her own name in this state. The answer to all this is that any omission in the statute laws of the two states must be supplied by the legislatures thereof. While it is sug-

gested there has been some such legislation of late, it is not claimed that it can or does affect this suit.

The judgment is therefore affirmed. All concur.

MILWAUKEE v. UNITED STATES FIDELITY AND GUARANTY COMPANY.

Supreme Court of Wisconsin. 1911.

144 Wisconsin, 603.

This is an action against the appellant as surety upon the official bond of one Woller. The action was tried by the court. The facts are not in dispute, and are substantially as follows: Woller was elected clerk of the Municipal Court of Milwaukee county April 2, 1901, and thereafter qualified and gave a bond to the city in the sum of $10,000, signed by the appellant as surety. * * *

The Municipal Court is the Superior Criminal Court of Milwaukee county, and by section 2506, Rev. St. 1878, as amended by Laws 1895, c. 7, § 4, the clerk is required to pay over quarterly to the city treasurer "all fines, penalties, collections and other fees (except witness fees)" and other moneys belonging to either the city or county treasury which may come into his hands; also semiannually to pay over to the city treasurer uncalled for witness fees, except the witness fees payable to policemen testifying for the prosecution, which are directed to be paid over to the policemen's relief association. By section 2504, Rev. St. 1878, the clerk is required to give an official bond, "conditioned that he shall account to and pay over to the city treasurer of said city, on the first Mondays of January, April, July and October, all fines, penalties and other moneys belonging to the treasury of the city or county of Milwaukee, which may come into his hands by virtue of his office, as clerk, up to the day of such payment, and that he shall, on the first Mondays of January and July in each year, account for and pay to the treasurer of said city all witnesses' fees which may have come to his hands as such clerk, up to the day of

payment, and which have not been paid to the persons entitled thereto."

By section 2512, Rev. St. 1878, the city treasurer annually at the time of paying over the state and county taxes is required to pay over to the county treasurer all fines and penalties collected in criminal cases.

* * * * * * * * * * *

WINSLOW, C. J.: * * * The statute which made it the clerk's duty to pay over all the moneys in question into the city treasury, regardless of the question of their ultimate disposal, provided that the bond to secure the performance of this duty should be executed and delivered to the city, thus expressly constituting the city as the obligee and necessarily the proper party to maintain an action on the bond for breach of any of its conditions. While the code requires that actions shall be brought in the name of the real party in interest (St. 1898, § 2605), the present case is unquestionably brought by the statute within the provisions of section 2607, which authorizes the trustee of an express trust or a person expressly authorized by statute to sue without joining with him the person for whose benefit the action is brought. *State v. Wettstein*, 64 Wis. 234, 25 N. W. 34.

* * * * * * * * * * *

SECTION 2. JOINDER OF PLAINTIFFS.[1]

(a) When Suing for Themselves.

GRAY v. ROTHSCHILD.

Supreme Court of New York. 1888.

48 Hun, 596.

DANIELS, J.: The plaintiffs consist of seven different firms, who sold goods at different times, to the defendants, Charles M. Rothschild and Jacob M. Rothschild, who were

[1] JOINDER OF PARTIES PLAINTIFF AND DEFENDANT.

All of the codes have substantially the following provisions relative to the joinder of parties.

1. "All persons having an interest in the subject of the action, and in

copartners, carrying on business in the city of New York under the name of Charles M. Rothschild & Co. It was alleged, in support of their right to maintain a joint action against the purchasers of the goods, together with Jacob M. Rothschild and Abraham Rothschild, that the goods had been obtained by means of false representations, and that the purchasers, together with the two other defendants, had entered into a conspiracy under which these goods, and others, were to be purchased on credit, and the firm of Charles M. Rothschild & Co. were to defraud the vendors out of the purchase prices by removing, secreting and disposing of the goods, and that this conspiracy had been carried into execution. The action was not for the recovery of the goods themselves, or a rescission of the sales made, but for the recovery of damages amounting to the aggregate sum owing to the several firms, joined as plaintiffs, for the sale of their goods and merchandise. The defendants demurred to the complaint, alleging in sup-

obtaining the relief demanded, may be joined as plaintiffs, except as in this chapter otherwise provided."

2. "Any person may be made a defendant who has or claims an interest in the controversy, adverse to the plaintiff, or who is a necessary party to the complete determination or settlement of the question involved therein."

3. "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined can not be obtained, he may be made a defendant, the reason thereof being stated in the complaint."

4. "Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action, at the option of the plaintiff."

See *Alaska*, Carter's Ann. Codes, 1900, §§ 34, 38, 39; *Arizona*, Rev. Stat., 1901, §§ 1306, 1307, 1313; *Arkansas*, Kirby's Digest, 1904, §§ 6005, 6006, 6007, 6009; *California*, Kerr's Codes, 1908, Code Civ. Pro., §§ 378, 379, 382, 383; *Colorado*, Rev. Stat., 1908, Code Civ. Pro., §§ 10, 11, 12, 13; *Connecticut*, Gen. Stat., 1902, §§ 617, 618; *Idaho*, Rev. Codes, 1908, §§ 4101, 4102, 4105, 4106; *Indiana*, Burn's Ann. Stat., 1908, §§ 263, 269, 270, 271; *Iowa*, Code, 1897, § § 3460, 3462, 3463, 3465; *Kansas*, Gen. Stat., 1909, § § 5627, 5628, 5629, 5631; *Kentucky*, Carroll's Codes, 1895, §§ 22, 23, 24, 26; *Minnesota*, Laws, 1905, § 4062 (4th provision, *supra*); *Missouri*, Ann. Stat., 1906, §§ 542, 543, 544, 545; *Montana*, Rev. Codes, 1907, §§ 6487, 6488, 6491, 6492; *Nebraska*, Comp. Stat., 1911, §§ 6607, 6608, 6609, 6611; *Nevada*, Comp. Laws, 1900, §§ 3107, 3108, 3109, 3110; *New Mexico*, Comp. Laws, 1897, § 2685, sub-secs. 4, 5, 6, 7; *New York*, Chase's Code Civ. Pro., 1910, §§ 446, 447, 448; *North Carolina*, Revisal of 1905, §§ 409, 410, 411, 412; *North Dakota*, Rev. Codes, 1905, §§ 6815, 6816, 6818, 6819; *Ohio*, Gen. Code, 1910, §§ 11254, 11255, 11256, 11258; *Oklahoma*, Comp. Laws, 1909, §§ 5567, 5568, 5569, 5571; *Oregon*, Lord's Laws, 1910, Code Civ. Pro., § 37 (4th provision, *supra*); *South Carolina*, Code of Laws, 1902, Code Civ. Pro., §§ 138, 139, 140, 141; *South Dakota*, Rev. Codes, 1903, Code Civ. Pro., §§ 87, 88, 89, 90; *Utah*, Comp. Laws, 1907, §§ 2913, 2914, 2917, 2918; *Washington*, Rem. & Bal. Codes, 1910, § 189 (containing the substance of the first three provisions, *supra*, in abbreviated form), 192; *Wisconsin*, Stat., 1898, §§ 2602, 2603, 2604, 2609; *Wyoming*, Camp. Stat., 1910, §§ 4323, 4324, 4325, 4327.

port of the demurrer, a misjoinder of plaintiffs; that causes of action had been improperly united, and that the complaint did not state facts sufficient to constitute a cause of action. And the court, at the trial, sustained the demurrer on the ground of a misjoinder of parties, and that several causes of action were improperly united in the complaint.

The accuracy of this decision has been resisted by the plaintiffs, chiefly under the authority of section 446 of the Code of Civil Procedure. This section has provided that all persons having an interest in the subject of the action, and in obtaining the judgment demanded, may be joined as plaintiffs, subject to exceptions not required now to be noticed. But this section of the code does not support the case, as the plaintiffs disclose it by their complaint, for each one of the firms in selling their goods, if the facts have been correctly set forth in the complaint, is entitled to maintain a separate action for damages against the purchasers and the two other persons implicated in the conspiracy, and that is all the relief, as the facts have been presented, which either one of the firms would be entitled to obtain. There is no joint subject of action in this case, neither can any joint judgment be recovered in the action under the authority of this section, but each one of the firms have a separate and distinct cause of action against the defendants, upon which, in case of a recovery, a separate judgment would necessarily be entered. The subject of the action is the recovery of the damages sustained by each one of the firms in the sale of their own goods. Each sale was distinct from all the others, and made upon fraudulent representations inducing such sale. There was no concurrent or joint action by the several firms, whose members have been joined as plaintiffs, in the sales of their respective goods, but each firm proceeded and transacted the business for itself. And for the value or price of its goods, if the facts are truthfully alleged in the complaint, each firm is entitled to a separate and distinct recovery. And no facts are alleged in the case in any form which would secure to the plaintiffs joint relief by way of a joint judgment. The case, by no construction which can be placed upon this section of the code, is in such a condition as to be maintained by these several firms as the plaintiffs in one action, and no other provision of the code has gone

so far as to permit separate actions for damages to be presecuted and sustained in this form.

Authorities have been assiduously collected and cited which are relied upon as sustaining so broad a rule of practice, as to permit this action to be sustained in its present form in behalf of all these different firms. They are cases which have arisen in courts of equity allowing actions to be maintained by persons severally interested in the subject-matter of the action and affecting all alike. In that class of cases an action is allowed to be maintained by all parties interested, in obtaining the same relief, but they have no application to this action, for these different firms are not entitled to any joint, or final relief, by way of a single judgment; what they are entitled to, if they can maintain their actions at all, is the damages which each firm has sustained by means of the sale of its own goods induced by fraudulent representations made to it. There is no joint subject-matter to be either set aside or maintained, as there was in the case cited on the argument, and no joint interest in the action. It is not proposed either to set aside or restrain the effect or progress of the alleged conspiracy, but all that is proposed is the recovery of damages to be apportioned to the goods sold by each one of these distinct and separate firms. The general principle so far as it has been extended by courts of equity allows separate plaintiffs having separate interests to join in an action for relief only where a common object is to be secured by the prosecution of the action. When that is not the case persons having distinct and independent claims against the defendant cannot join in a suit for the separate relief of each. * * *

The case of *Goodnight v. Goar* (30 Ind., 418) is an authority directly against the plaintiff's action, for there it was held that a joint action on an agreement by several persons to pay a proportionate part of what either should pay for a substitute, in case either should be drafted, could not be maintained. But that the suit for contribution must be maintained against each person separately who had bound himself by the agreement. The case of *Wood v. Perry* (1 Barb., 114), is likewise opposed to the right of the plaintiffs to maintain this action jointly and so is that of *Emery v. Erskine* (66 Barb., 9), and, also, *Howell v. City of Buffalo* (2 Abb. Ct. of App. 412). This decision

has been assailed by the counsel for the plaintiffs as erroneously made, but it has the support of the general principle already mentioned, observed and enforced in courts of equity, that persons having distinct and independent claims to relief cannot, unless the case is a peculiar one, join in the prosecution of one action. There the property of the several plaintiffs had been sold for the non-payment of separate amounts assessed for an improvement. The object of this action was to restrain the execution and delivery by the city of certificates of sale, upon the allegation that the assessments were unlawful. The certificates when issued would affect only the property of each different owner. They would have no joint effect upon any of the property. And it was held by the court, chiefly for that reason, that the action could not be maintained, each plaintiff having only a separate and distinct right of action for relief in which the others were in no manner interested or identified. In all the cases containing any reference whatever to separate and distinct claims for damages, the decisions have been guarded by the conclusion previously stated, that a joint action by several and distinct parties claiming several and distinct damages, cannot be maintained. Any other rule would be attended with so much perplexity, intricacy and confusion at the trial, as to render the jury before which the action must necessarily be tried next to incapable of deciding and disposing of it. If this action could proceed to trial seven different causes of action would be presented for the hearing and decision of the jury, and it would be extremely difficult for them to carry in their minds anything like an intelligent recollection of the evidence given, affecting so many different rights of action. A rule allowing the several and distinct firms to join in the prosecution of one suit for damages would not only be attended with the greatest embarrassment, but would result in probable injustice to one or more of the parties from misapprehensions or oversight of evidence. The demurrer was properly sustained at the trial and both the judgment and order should be affirmed.

* * * * * * * * * * *

VAN BRUNT, P. J., and BRADY, J., concurred.

Judgment affirmed, with costs.

McINTOSH v. ZARING.

Supreme Court of Indiana. 1897.

150 Indiana, 301.

McCABE, J.: The appellees sued the appellants in the Washington Circuit Court to recover attorney's fees upon a written contract. * * * The contract sued on is as follows: "Ellen McIntosh and Andrew J. McIntosh, her husband, have this day employed as counsel to contest the will of W. C. De Pauw, deceased, and to conduct all legal proceedings for that purpose, Friedly & Giles, of Bedford, Indiana, Zaring & Hottel, of Salem, Indiana, and C. L. & H. E. Jewett, of New Albany, Indiana. Suit to contest said will is to be immediately filed and prosecuted with all reasonable dispatch; and for all their services, of every kind, performed in relation to said suit, and attorneys are to receive the following compensation, and no other, viz.: For their services in the event that the will of W. C. De Pauw is set aside and Ellen McIntosh declared entitled to share in his estate, a fee equal to twenty-five and a half (25½ per cent.) per cent. of the value of the estate which she shall thus be entitled to, and does, receive; and in the event of a compromise or adjustment before a trial is begun, whereby said will is allowed to stand, a sum equal to twelve and a half per cent. (12½) of the amount so received or stipulated to be received by her. They agree to pay said fee as follows: One-third to Friedly & Giles, one-third to Zaring & Hottel, and one-third to C. L. & H. E. Jewett. Ellen McIntosh. A. J. McIntosh. Friedly & Giles. C. L. & H. E. Jewett. Zaring & Hottel." The complaint alleged the performance of the contract on the appellee's part, and that the suit was compromised before trial, by which appellant Sarah E. McIntosh received from the estate of said W. C. De Pauw $250,000, and that she fraudulently concealed the knowledge of the amount so received, and falsely represented to them that she had only received $50,000 from said estate by said compromise; that, relying upon such representations, the appellees had settled with and accepted from her 12½ per cent. of $50,000; that 12½ per cent. on the excess received by her was still

due them, and remained unpaid,—demanding judgment for $30,000 and other proper relief. It is also alleged that Charles L. and Henry E. Jewett refused to join as plaintiffs, and for that reason they were made defendants. They filed an answer disclaiming all interest in the suit. It is also alleged in the complaint that the appellees John A. Zaring and Milton B. Hottel were attorneys at law, engaged in the practice of their profession, under the firm name of Zaring & Hottel, at the town of Salem, Washington county, Indiana, and that appellee Joseph Giles and the said George W. Friedly were at said date engaged in the practice of law in the city of Bedford, Lawrence county, Indiana; that, after the performance of said services under said contract, said George W. Friedly had died, and the plaintiff Edith M. Friedly had been appointed administratrix *de bonis non* of the estate of said deceased.

We hold that the contract sued on did not create a joint right of action in all the plaintiffs, and hence the legal effect of the written contract was the same as if there had been three several and separate written contracts in favor of each of the three several firms or groups of attorneys; and hence we hold that the contract itself did not create a joint right of action in said attorneys, and cite the following cases supporting that conclusion: *Goodnight v. Goar,* 30 Ind. 418; *Tate v. Railroad Co.,* 10 Ind. 174; *Lippard v. Edwards,* 39 Ind. 165; *Martin v. Davis,* 82 Ind. 41; *Harris v. Harris,* 61 Ind. 117; *Elliott v. Pontius,* 136 Ind. 641.

But there is an element in the complaint beyond the scope of the mere written contract that exerts an influence upon the right of the several obligees or payees therein to maintain a joint action thereon. That element is the allegations of fraud and misrepresentations of the defendants as to the amount Mrs. McIntosh had received from the estate of her father on the compromise, thereby inducing the said attorneys to accept a much smaller sum in full satisfaction of the contract than they were entitled to under its terms, according to the facts as they really existed. These allegations were material in order to enable the plaintiffs to avoid the settlement, because without avoiding that settlement none of them could recover on the contract. While neither one of the firms of attorneys in the contract mentioned was interested in either of the other firms recover-

ing thereon, so as to enable them to join in a suit thereon, yet they were all interested in the other element which was essential to be established, without which neither of them could recover, namely, the fraud by which they had been induced to accept a smaller sum in full settlement and discharge of the contract than was really due them. In other words, they were all alike interested in avoiding the settlement. Our code provides: "All persons having an interest in the subject of the action, and in obtaining the relief demanded, shall be joined as plaintiffs, except as otherwise provided in this act." Rev. St. 1894, § 263; Rev. St. 1881, § 262. Another section of the code provides that, "when the action arises out of contract, the plaintiff may join such other matters in his complaint as may be necessary for a complete remedy and a speedy satisfaction of his judgment, although such other matters fall within some other one or more of the foregoing classes." Rev. St. 1894, § 281; Rev. St. 1881, § 280. These sections of the code have the effect even to broaden the rule in equity in such cases. That rule was that several separate creditors might unite in an action where a part of the relief prayed was common to all. But the rule required them to first reduce their respective claims to judgments at law. However, there were some exceptions to that rule. Where the debtor was dead or had absconded from the state, they could join in such action without obtaining judgments at law. *Kipper v. Glancey,* 2 Blackf. 356; *Ruffing v. Tilton,* 12 Ind. 259. The sections quoted have been construed as authorizing such creditors to join as plaintiffs, though their claims be separate and distinct, and even though the debtor is alive, and has not absconded, if plaintiff have a common interest in any of the relief sought, whether their claims have been reduced to judgments or not; and, if they have not, they may recover separate judgments on such claims in connection with the relief sought common to all, such as suit by creditors to set aside fraudulent conveyances, and subject their debtor's property to the payment of their debts and the like. And, accordingly, persons who have any interest in the relief demanded are properly joined as plaintiffs. *Durham v. Hall,* 67 Ind. 123; *Strong v. Taylor,* 79 Ind. 208; *Field v. Holzman,* 93 Ind. 205; *Elliott v. Pontius,* 136 Ind. 641; *Armstrong v. Dunn,* 143 Ind. 433; *Carmien v. Cornell,* 148 Ind. 83; Pom. Rem. §§ 266-268; 1 Daniell, Ch. Prac.

235. We therefore hold that the relief sought against the alleged fraud was such as was common to all the plaintiffs, and was essential to the right of any of them to recover on the contract; and hence such allegations gave them a right to join as plaintiffs, and in that respect the complaint was not bad for want of sufficient facts. It is true, there was no specific prayer asking that the settlement be set aside on account of the alleged fraud; but the facts were stated entitling plaintiffs to such relief, and there was a general prayer for judgment and other proper relief, and that is sufficient, under the code, to entitle the plaintiffs to all relief that the facts stated will warrant.

We find that the complaint does not allege that Friedly and Giles were partners at the time, but it does allege that Zaring and Hottel were partners, engaged in the practice of law. * * * It is contended by the appellants that there is another element in the complaint having the same effect as if the existence of said partnership between Friedly and Giles had been alleged in the complaint; and that is that while the contract sued on is separate and distinct as to and between the three firms or groups of attorneys, as if it had been written on three separate papers, and each separately signed by the several firms, it is joint as between the members of each firm or group of attorneys; and this contention, we think, must prevail. The amount stipulated to be paid to Friedly and Giles was *in solido*. It was not stipulated what amount of the share to be paid to them should be paid to either Friedly or Giles; and the same is true as between the other two firms or groups of attorneys mentioned in the contract. An eminent author on contracts says: "Where the payment in the first place is of one sum *in solido*, and afterwards to be divided among the payees, there, generally, the interest of the payees is joint; but, where the first payment is in several sums among the several payees, there, generally, their interest is several." 1 Pars. Cont. (5th Ed.) 19. The interest, therefore, of Friedly and Giles, even in the absence of a partnership between them, is, as between themselves, joint in the share to be paid to them under this contract. On such a contract the law vests the right of action exclusively in the survivors where one or more of the joint obligees have died. 1 Pars. Cont. (5th Ed.) 31. As was said by this court in *Railway Co. v. Adamson*, 114 Ind. at pages

285, 286: "The question with which we have to deal is important, and not entirely free from difficulty; but, after the most careful study we have been able to give the subject, we feel bound to hold that the code does not change the common-law rule. The question goes back of the procedure, and takes up the element of the right itself. The right the statute does not profess to change. It reaches only the remedy. In the case of a joint contract, the whole right—the unified interest—vests in the survivors. Upon them falls the entire right. If they do possess the entire right, then they are the real parties in interest, since it is inconceivable that, if they do possess the entire right, any other person can be a real party in interest. The principle of the common law vesting the whole right in the survivors is not changed by the code, and, so long as the principle remains unchanged, the persons possessing this entire right must be regarded as the real parties in interest. It requires legislation to abrogate a rule of law, and the courts cannot assume the functions of the legislature. Mr. Pomeroy, who as strongly as any one urged a liberal construction of the code, and an extension of its provisions, affirms that the common-law principle has not been abrogated. In discussing the question, he said: 'In actions *ex contractu*, all the persons having a joint interest must be made plaintiffs; and, when one of them dies, the action must be brought or must proceed in the names of the survivors. The personal representatives of the deceased obligee or promisee cannot be joined as co-plaintiffs; and in the same manner, in actions *ex delicto* for injuries to personal property, all the joint owners must unite, and, if one of them dies, the action is to be prosecuted by the survivors alone. These common-law rules remain in full force.'"

It follows that the complaint shows upon its face that it did not state facts sufficient to constitute a cause of action in favor of one of the plaintiffs, namely, Edith M. Friedly, administratrix of George W. Friedly, deceased, the same as if the complaint had alleged the existence of a partnership between Friedly and Giles. * * *

It is firmly settled in this state that a complaint which does not state a good cause of action as to all, though it does as to some, of the plaintiffs, is bad as to all, for want of sufficient facts to constitute a cause of action. * * * To obviate the inevitable conclusion to which these authori-

ties lead, appellees' learned counsel invoke the aid of another section of the code, reading thus: "Judgments may be given for or against one or more of the several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves." Rev. St. 1894, § 577; Rev. St. 1881, § 568. They therefore insist, in effect, that, under this provision of the code, a judgment may be rendered in favor of each of the plaintiffs as have a cause of action stated in their favor in the complaint; and judgment may be rendered against the others in favor of whom no cause of action is stated in the complaint. If that is the true force and effect of that section of the code, then all that long line of decisions of this court last cited is wrong, and every one of them ought to be overruled. But the section is wholly inapplicable to a question of pleading, and that is the question we have been dealing with. The section referred to relates to a question of evidence, and the manner of the rendition of judgment in such cases. The section authorizes the rendition of judgment in favor of some of the plaintiffs, and against others of them, when the evidence requires or justifies it. That could not be done at common law. But the section assumes that the complaint is good, stating facts sufficient to constitute a cause of action in favor of all the plaintiffs. Accordingly, it was said, in speaking of this section by this court in *Nicodemus v. Simmons,* 121 Ind. at pages 567, 568: "If, therefore, two or more persons bring a joint action, alleging a joint cause of action, and it turns out upon the trial that, upon the facts alleged in the complaint, some, but not all, of the plaintiffs, are entitled to recover, the court or jury, as the case may be, will so find, and judgment will be rendered accordingly. * * * But, as we have already held, the complaint is good, and the question before us is one of evidence, and not of pleading. Upon the evidence before them, the jury found for the female plaintiff, and the court rendered judgment in her favor. This, we think, was proper, and is in accordance with the provisions of said section 568, Rev. St. 1881 [section 577, Rev. St. 1894]." It is very clear that the section quoted is in no way inconsistent with the long line of cases cited holding that a complaint by plaintiffs will be bad for want of sufficient facts if it does not

state a cause of action in favor of all the plaintiffs. It follows from the principle decided in that line of cases that the complaint before us failing to show that Edith M. Friedly, administratrix, etc., had any right of action on the contract, and showing affirmatively that the interest of her intestate and the appellee Giles in said contract was joint, and vested in the surviving joint contractor the sole right of action thereon; and therefore, the complaint failing to state a cause of action in favor of Edith M. Friedly, it did not state facts sufficient to constitute a cause of action as to any of the other plaintiffs.

* * * * * * * * * * *

GEORGE v. BENJAMIN.

Supreme Court of Wisconsin. 1898.

100 Wisconsin, 622.

[Thirty-one persons, by written agreement, formed a "syndicate" to purchase, manage and sell a tract of land, each agreeing to contribute a certain sum at once and thereafter to pay from time to time such sums as should be needed for payments on the land. One of their number was agreed upon as trustee to hold the title to the land, and he afterwards, in writing, declared a trust in favor of each of the subscribers to the extent of a one thirty-first interest in the land. Meetings were held and assessments made to meet the payments coming due on the land. Subsequently, by a resolution adopted at a meeting of the subscribers, plaintiff was authorized and directed to bring suit in his individual name, for and in behalf of himself and his associates, to collect the amount due upon said assessments from the defendant, one of the subscribers, who had accepted the declaration of trust and had attended meetings, but had paid only the first assessment.][1]

* * * The complaint contains seven causes of action. * * * The defendant interposed a demurrer to each cause of action on the grounds, among others, that

[1] A condensation of the statement of facts.

* * * there was a defect of parties plaintiff and defendant: and that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and, from the order entered thereon, this appeal is taken.

BARDEEN, J.: Two questions are involved in this appeal: (1) Is there a defect of parties plaintiff? (2) Does the complaint state a cause of action?

1. The plaintiff seeks to justify the maintenance of this action by himself, and on behalf of others, under Rev. St. § 2604. This section reads as follows: "Of the parties to the action, those united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should be joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."

As a reason why this action is brought in the name of the plaintiff alone, the complaint alleges that "the question involved in this action is one of a common or general interest to many persons, and that the parties interested and associated herein are very numerous, and that many of the persons interested herein are not residents of the state of Wisconsin, but that they are residents of other states; that it is impracticable to bring all of said persons before the court." He seeks to sustain his right to maintain this action on the two grounds mentioned in the statute,—that the question involved is one of common and general interest of many persons, and that the parties are very numerous, and it is impracticable to bring them all before the court. As stated in *Day v. Buckingham*, 87 Wis. 215, and repeated in *Frederick v. Douglas Co.*, 96 Wis. 411, this statute has been construed as merely re-enacting the rules which prevailed in equity, and which otherwise might have been held to be abolished by the code. So, also, it has been held that, when the question is one of common or general interest, the action may be brought by one or more for the benefit of all who have such common or general interest, without showing that the parties are even numerous, or that it would be impracticable to bring them all before the

court. *McKenzie v. L'Amoureux,* 11 Barb. 516; Barb. Parties, 50, 51. Bliss, Code Pl. § 79, says: "This rule is in harmony with the requirements that all the parties plaintiff must have a joint or common interest, and the interest of the parties represented must appear to be such as to entitle them, were they all before the court, to maintain the action in their own names. It is therefore simply a rule of convenience, and, though pertaining, like other general rules, to all cases to which it is applicable, yet in practice it will seldom be appealed to except in actions heretofore called equitable." It requires but a mere inspection of the complaint to show that the claim that the question involved in this action is "one of common or general interest to many persons" is not justified by the facts alleged. On the contrary, the complaint shows that the question involved arises out of contract, personal to each one of the subscribers to it. It shows positively and definitely that all are united in interest. Each subscriber to the contract agrees with every other subscriber that he will "pay such sum or sums as shall be needed for future payments on said property, as the same are demanded and required by the parties in interest herein." *McKenzie v. L'Amoureux, supra,* is an instructive case on this point. Bliss Code Pl. §§ 80, 81; Pom. Code Rem. § 390 *et seq.* It would seem too plain for argument that the complaint fails to state any fact which shows that the parties to this contract have a common or general interest which would enable each to maintain an action in his own name if he was before the court.

As to the second ground relied on, the statute does not require any question of common or general interest to this great number. It is based upon the fact that the parties are so numerous that it is really impracticable to make them all actual plaintiffs. It is perhaps difficult to say just where the line should be drawn; just how few or how numerous the parties must be to get within the lines of the statute. Under the rule in equity, it was held that 20 creditors interested in real estate, the subject of litigation, was not so large a number as that the court would allow a few to represent the others. *Harrison v. Stewardson,* 2 Hare 530. In New York it was held that the number 35 was not sufficiently great to allow a few to represent the many. *Kirk v. Young,* 2 Abb. Prac. 453. CLERKE, J., said:

"But this is not a case in which it is *impracticable* to bring all the plaintiffs before the court. Their number is thirty-five, and, although perhaps too numerous not to make it somewhat inconvenient to the pleader to recount their names, it is certainly not impracticable to do so; and without a very obvious necessity the court should always require that all the persons in the action should appear by their individual and real names." The fact that all the parties to the contract are united in interest affords a sufficient reason for holding that they are necessary parties to the action. Dicey, Parties, rule 13, p. 104, says: "All the persons with whom a contract is made must join in an action for a breach of it." But in this case the parties sustain such relations to each other as in legal effect makes them partners. No other construction can be given to the contract, and their acts under it, without doing violence to the plainest legal principles. 1 Chit. Pl. p. 13, says: "It is a general rule that, in the case of partners, all the members of the firm should be plaintiffs in an action upon a contract made with the firm; nor can any private arrangement by the firm that one, only, of the parties shall bring the action, give him the right to sue alone." And Dicey (Parties, p. 149) says that this holds good even though the company consisted of a hundred persons. Neither can the action be sustained on the ground that the alleged syndicate is an "unincorporated company" or a "voluntary association." It does not appear that they have done anything to give it the characteristics of such organizations, except to elect officers. So, in whatever view we consider the case, we are unable to see how the plaintiff can maintain this action alone.

2. Had there not been a defect of parties plaintiff, we feel quite well satisfied that this action is properly founded. The contract set out in the complaint, and their proceedings under it, make the parties thereto partners in legal effect. But it is said one partner cannot sue another upon a demand arising out of partnership transactions. Unquestionably, that is the law, but the difficulty is that it has no application to the facts of this case. The cause of action stated is not one growing out of transactions of the syndicate. It is based upon a direct and positive promise of defendant with all his associates to pay money for a given object. Relying upon these mutual promises, over $125,000

has been paid in and devoted to the purpose agreed upon. Defendant has received and retained his interest in the company. Surely, he is in no position to say there must be a dissolution and an accounting before he will pay his just share towards carrying on the proposed enterprise. The books are full of cases sustaining the defendant's liability, and the right of the other parties to compel payment of the amount in default. COWEN, J., in *Glover v. Tuck*, 24 Wend. 153, says: "Where, as in the case before us, the covenant is to make specific advances for the purpose of launching a partnership, I presume the right to an action was never questioned." * * *

BY THE COURT: The order of the Circuit Court is reversed, and the case is remanded for further proceedings according to law.

SCHIFFER v. CITY OF EAU CLAIRE.

Supreme Court of Wisconsin. 1881.

51 Wisconsin, 385.

This case is thus stated by Mr. Justice TAYLOR: This action is brought to recover damages for flooding the plaintiff's house and lot, situate in the city of Eau Claire, by reason of the maintenance of a dam across the Chippewa river by the appellant. The complaint shows that the premises flooded are a lot containing one acre of land, with a dwelling house and appurtenances situate thereon; that one Winnard Eller owned the same in fee; that he died intestate in 1873, and left a widow, Magdalena Eller, and seven children, his only heirs at law; and that Otto R. Schiffer is the only appointed administrator of the estate of said deceased. The widow, children, and the administrator all join in this action as plaintiffs. The complaint alleges that the house and a quarter of an acre were the homestead of the deceased at the time of his death, and as such homestead the widow is entitled to an estate therein during her widowhood, and that she is still the widow of the deceased; that all the premises have been occupied by the widow and

her children without any setting apart of the homestead, or the widow's dower in the remainder of the premises, ever since the death of the deceased, and were so occupied at the time of the injuries complained of. After alleging the erection and maintenance of the dam by the defendant, the complaint alleges that, by reason of the erection and maintenance thereof, the water of the river percolates through the banks of the river and overflows and submerges a considerable portion of the premises, and has greatly damaged and does greatly damage the same, *and destroyed the value* thereof, and has rendered the same and ever will continue to render the same *untenantable and worthless;* and that by reason thereof the said widow and her children were obliged to and have wholly abandoned said premises, and cannot and have not for upwards of nine months lived upon or occupied the same, and the same has become and ever will continue *to be worthless for the purposes of cultivation,* and *wholly unfit therefor,* and that thereby the plaintiffs have sustained such injury and damage in the sum of $1,200.

To this complaint the appellant demurred, and allege as grounds of demurrer—(1) That several causes of action have been improperly united therein; and (2) that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendant appealed from the order overruling the same.

TAYLOR, J.: The appellant insists that there are three separate causes of action stated in the complaint, viz.: (1) A cause of action in favor of the widow alone for the injury done to the homestead; (2) a cause of action in favor of the children of the deceased for the injury done to the estate in remainder, as to the homestead; and (3) a joint cause of action in favor of the widow and children for the injury done to the three-fourths of an acre which is not a part of the homestead. As to this last cause of action it is not denied that the widow and children may properly join as plaintiffs. It being conceded that the parties are properly joined as to the third cause of action, the only question to be determined upon this appeal is whether the persons owing the remainder may join in an action with the person owning the intervening estate to recover damages caused by the same unlawful act of the defendant, when it is shown that the persons owning the intermediate estate

and the estate in remainder are both injured by such act. The learned counsel for the appellant do not contend that an action cannot be maintained by the person owning the estate in remainder during the continuance of the intermediate estate, when the injury complained of is detrimental to the estate in remainder. That such action may be maintained by the remainder-man, especially against a stranger to the title, is well settled by the authorities. *Van Dusen v. Young,* 29 N. Y. 9; *Pamfret v. Ricroft,* 1 Saunders 321, note 322*b*; *Queen's College v. Hallett,* 14 East 489; *Jackson v. Pesked,* 1 Maule & Selwyn 234; Chitty's Plead. 140.

But it is insisted by the learned counsel for the appellant that as the damages which the remainder-man can recover do not belong to the person owning the intermediate estate, and *vice versa,* that the causes of action are separate and distinct in favor of the separate plaintiffs, and cannot therefore be joined. It is not contended that if this were an action to abate the defendants' dam as a nuisance to the plaintiffs, they could not all properly join in such action under the provisions of section 2602, Rev. St. 1878. See Bliss on Code Pleadings, § 73, and cases cited; *Williams v. Smith,* 22 Wis. 594; 1 Wait's Practice 112. The section reads as follows: "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided by law." But it is argued that because this is an action which was formally denominated an action at law, and because the relief demanded is compensation in money only for the injury sustained, and because the money recovered will belong to the plaintiffs in severalty in proportion to the injury each has sustained, the plaintiffs cannot join in the action. Certainly this objection is not taken in the interest of the defendant, and, if it must prevail, it must prevail on account of some technical rule which remains in force notwithstanding the code. So far as the defendant is interested it would seem for his protection that all persons whose estate or interest in the same property has been injured by the act of the defendant should join in the action. The judgment would bar all the plaintiffs and save him the expenses of several suits instead of one. In such case the whole damage to the property could be much more readily ascertained than if the court and jury were compelled to divide it up and determine how much

the injury was to the remainder-man, and how much to the person owning the intermediate estates. That there might be difficulty in determining the rights of the plaintiffs, as between themselves, is a matter which does not concern the defendant, and he is relieved from this difficulty by the joinder of the parties. Bliss, in his work above quoted, section 74, says: "But it has come to be generally conceded that the rule under consideration is universal in its application, and in the relief sought, they may unite as plaintiffs for the recovery of money or other specific real or personal property." And in speaking of the objection as to the difficulty of adjusting the rights of the plaintiffs between themselves, he says: "But the suggestion supposes that the several rights will always be ascertained by the verdict. While in many cases this may be done, and must be done when the extent of the liability depends upon the amount of each of the several claims, yet otherwise and in other cases the verdict need only find the fact of the defendant's liability and its amount, leaving the adjustment among the plaintiffs to be made by themselves after judgment, or by the court before it is entered."

This last suggestion of the learned author was approved and acted upon by this court in *School-Districts v. Edwards*, 46 Wis. 150. Justice LYON, who delivered the opinion of the court in that case, says: "The fact that the several school-districts are entitled to the money in unascertained and probably in unequal proportion is no impediment to this action. This is a matter between the districts, with which the appellants have no concern. It is sufficient, for the purposes of maintaining the action, that they are jointly entitled to the money claimed. It may be remarked, however, that no good reason is perceived why the court may not, in this action, (if there is a recovery,) direct the money to be paid into court, and, by reference or otherwise, ascertain the due proportion of each district, and distribute the money accordingly." In this case the defendants had given to the town of Centralia their due-bill or note for $850, and the town had, as was held, lawfully assigned the due-bill to the several school-districts in the town for the support of schools, to be apportioned amongst said districts according to the number of persons of school age in each. Three of the districts united as plaintiffs in the action, and the fourth, being all the districts in the town, having refused to join

with the plaintiffs, was made a defendant. The complaint was demurred to, and this court held it good, and that the joinder of the plaintiffs was proper for the reason above stated. In that case there was one subject of the action, to wit, the defendants' due-bill. All the plaintiffs had an interest in it, but their interests were separate, different, and unascertained in amount.

In the case of *Brown v. Loomis,* 16 Barb. 325, the court held that the rule of the statute is just as applicable to actions which were heretofore denominated actions at law as to equitable actions. Justice GRIDLEY, who delivered the opinion of the court, says: "This is now the rule in all cases, whether such as were formerly the subjects of suits in equity or of actions at law; and we are to administer it according to its true intent, however the practice may differ from the rule that heretofore has prevailed in actions at law. It is only necessary to advert to the fact that the rule prescribed by the code is applicable to *all* suits, and then consider the identity of the rule the code has adopted for the joinder of plaintiffs, with the rule as it prevailed in equity, to be convinced that we are now to hold the same rule applicable to both." The action in this case was to recover damages upon an injunction bond. The plaintiffs were not jointly interested in the damages resulting from the injunction, but they were all damaged by reason of its allowance, and it was held that all who were injured by it, and who were included in the bond, could join in the action as plaintiffs, and the learned judge in conclusion says: "All have an interest in the subject of the action and the relief demanded; that is, in the damages arising out of the operation of the injunction. It is not said to be a joint or an equal interest, or even a common interest, but simply an interest in the subject of the action, with a view of doing full justice, and settling the rights of all parties in interest in one suit."

In the case at bar the subject of the action is the premises owned by the plaintiffs, and the cause of action is the injury done to the premises by a single act of the defendant. All the plaintiffs have an interest in the subject of the action, and in obtaining the relief demanded, and are properly united in the action. There is, therefore, no improper joinder of causes of action. This view of the case is also sustained by this court in *Samuels v. Blanchard,* 25 Wis. 329;

Bassett v. Warner, 23 Wis. 673, 686; *Welch v. Sackett,* 12 Wis. 243; *Stevens v. Campbell,* 13 Wis. 375; *Gates v. Boomer,* 17 Wis. 455; *Peck v. School-Dist.* 21 Wis. 515, 520; and in the following cases in other courts: *Railroad Co. v. Schuyler,* 17 N. Y. 592, 606; *Simar v. Canaday,* 53 N. Y. 298, 306; *Owen v. Frink,* 24 Cal. 171.

* * * * * * * * * * *

We agree with the learned counsel for the appellant that no cause of action is stated in the complaint in favor of the administrator; that he is a superfluous party, and that such a superfluity of parties cannot be taken advantage of by the demurrer of the defendant filed in this action. *Marsh v. Supervisors,* 38 Wis. 250; *Willard v. Reas,* 26 Wis. 540.

BY THE COURT: The order of the Circuit Court is affirmed.

FIRST NATIONAL BANK OF CENTRAL CITY v. HUMMEL.

Supreme Court of Colorado. 1890.

14 Colorado, 259.

PATTISON, C.: * * *

* * * * * * * * * * * * * * * * * * *

The next question presented is whether John S. Risdon was improperly joined as a defendant. It is claimed that, if plaintiff in error was the real party in interest, Risdon could not be properly joined either as plaintiff or defendant. The relation of the parties to each other was as follows: * * * The plaintiff was the agent of Risdon for the purpose of collecting the money * * * and had the legal title to the draft which was drawn, and the right in the first instance to receive the money; but Risdon was the beneficial owner of the fund. This being the relation of the parties, the question of parties plaintiff does not seem to be difficult. Section 3 of the code, which was in force when this action was brought, provides that "every action shall be prosecuted in the name of the real party in interest, except as otherwise provided." Section 5 provides that the trustee of an express trust may bring an action without joining

beneficiaries, and that a trustee of an express trust includes a person in whose name a contract is made for the benefit of another. Section 10 declares that "all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs." Section 12 provides that, "of the parties to the action, those who are united in interest shall be joined as plaintiffs or defendants; but, if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint."

The meaning of the language of the first section cited has been frequently construed by the courts. The "real party in interest" is held to mean the person in whom the legal title to the claim in suit is vested. *Bassett v. Inman,* 7 Colo. 270, and cases cited. The suit, therefore, was properly brought in the name of the plaintiff. But, inasmuch as Risdon was * * * in fact the beneficial owner of the claim, he must be deemed to be interested in the subject of the action, within the meaning of section 10, above cited, and therefore a proper party plaintiff in the suit.

In commenting upon the section last mentioned, Pomeroy, in his work on Remedies and Remedial Rights, at section 199, says: "The extent of the interest is not the criterion, nor its source, nor origin. If the persons have any interest, —whether complete or partial, whether absolute or contingent, whether resulting from a common share in the proceeds of the suit, or arising from the stipulations of the agreement,—the language applies, without any limitation or exception, and without any distinction suggested between actions which are equitable and those which are legal." All persons standing in the relation to the subject-matter of the action, as above defined, may be properly joined as plaintiffs. In this particular case, Risdon refused to unite with plaintiff, and was properly joined as defendant.

* * * * * * * * * * *

(b) When Suing as Representatives of a Class.

McKENZIE v. L'AMOUREUX.

Supreme Court of New York. 1851.

11 Barbour, 516.

Demurrer. The plaintiffs stated in their complaint, that the action was brought as well on their own account as on the account of the other legatees of Mary McKay, deceased. They then set forth the will, from which it appeared that they, together with Margaret Heinzelman, Eliza McIntosh and Mary, wife of John Norton, were entitled to legacies, and that the estate of the testatrix, real and personal, chargeable, as they alleged, with the payment of those legacies, was given and devised to Elizabeth, Caroline, Jane and Hallowell Matilda, daughters of the late Lachlane Stewart. These three residuary legatees and devisees, together with James L'Amoureaux, administrator of the estate with the will annexed, were defendants in the suit. It was alleged that the personal estate was insufficient to pay the legacies. The plaintiffs demanded judgment that the will be established, that an account might be taken of the personal estate, and also of the debts, legacies, and funeral expenses of the testatrix; that the real estate might be sold, and that the proceeds, together with the personal estate, might be applied in due course of administration in payment of the debts and legacies. To this complaint the defendants, who were residuary legatees, demurred, stating several grounds of demurrer, and among others that there was a defect of parties, plaintiff or defendant, in not making Margaret Heinzelman, Eliza McIntosh, and Mary Norton, three of the legatees named in the will, and interested in the matters sought to be brought in question, and involved in this action, parties, either plaintiffs or defendants, and also that the joinder of more than one, and less than the whole of such legatees was either a defective or improper joinder of plaintiffs in this action.

The cause having been argued before Mr. Justice WRIGHT, upon the issue of law so joined, and the demurrer having been sustained, the plaintiff appealed from the decision.

By the Court, HARRIS, J.: The learned judge who decided this cause at the special term, admitted that as the practice existed at the time of the adoption of the code, this action might properly have been brought by the plaintiffs on behalf of themselves and the other legatees who were not made parties. The authorities to which he has referred, show that one legatee might sue on behalf of himself and all the rest, and that all might avail themselves of the benefit of the decree. (*Brown v. Rickets*, 3 John. Ch. 553. *Thompson v. Brown*, 4 Id. 619. See also *Ross v. Crary*, 1 Paige 416. *Hallett v. Hallett*, 2 Id. 15. Cooper's Eq. Pl. 39, 40.) But he came to the conclusion that this rule had been changed by the code, and that now all persons who are necessary parties to a complete determination of the questions involved in the action, must be brought before the court either as plaintiffs or defendants. Upon this ground the demurrer was sustained.

In this conclusion I can not concur. So far was the legislature from intending any change in the rule on this subject, that in making the great changes contemplated by the adoption of the code, it was careful to preserve this convenient practice of the court of chancery. The code commissioners had reported a section, copied substantially from one of the rules of the Supreme Court of the United States, providing that those who are *united in interest* must be joined as plaintiffs or defendants, except that, if the consent of any one who should have been joined as plaintiff, can not be obtained, he may be made a defendant, the reason thereof being stated in the complaint. This too was the practice in the court of chancery. The legislature adopted the provision thus reported, but added to the section as follows: "And when the question is one of a common or general interest of many persons; or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." (Code, Sec. 119.) This was also in accordance with the then existing practice of courts of equity. The legislature seems to have apprehended that, by adopting the rule reported by the commissioners, it might be understood to have rejected the kindred rules embraced in the latter clause of the section. To prevent this misapprehension the latter clause was added, thus retaining in the new practice the same rules by which to determine whether

the proper parties were before the court, which then prevailed in the court of chancery.

The section in question requires that, except in a specified case, all who are *united in interest* shall be joined as parties; and then declares that when the action involves a question of *common or general interest* to several parties, *or,* when, though united in interest, the parties are very numerous and it is impracticable to bring them all before the court, then one or more may sue or defend for all. This I understand to be the clear and obvious import of the section. The distinction between parties who are "*united in interest*" and those who have "a common or general interest" in the question, is aptly illustrated in this very case. By the will the testatrix gave to the children of her deceased sister Jane Ferguson a legacy of $400. The plaintiffs, James Ferguson, Elizabeth Ferguson and George Ferguson are those children. They are jointly, not severally, entitled to the legacy. Like three partners, suing for a debt due to them as partners, they are "united in interest," and must be joined as parties. But the plaintiffs, Isabella McKenzie and Barbara McKenzie are each entitled to a separate legacy. They have *a common interest* in establishing the will and having a fund provided for the payment of the legacies, but they are not united in interest with each other or the other legatees. So also in the case of the three legatees who are not made parties.

The error into which my learned associate has fallen arises from his failure accurately to distinguish between the two classes of cases in which it is allowable for one or more parties to sue for the benefit of others as well as themselves. He has evidently understood the statute to allow a suit to be brought in this form, when the question is one of common or general interest, and where, in such a case, the parties are very numerous and it is impracticable to bring them all before the court. Accordingly he says, "this is not a case in which the parties are very numerous," nor would it be "impracticable to bring them all before the court." "There are but three persons whose interest in the subject-matter of the action is identical with the plaintiffs. These are not joined as plaintiffs, nor is there any reason assigned why they are not." I have already shown, I think, that when the question involved is one of "*common or general interest,*" the action may be brought by one or

more for the benefit of all who have such common or general interest, without showing that the parties are very numerous, or that it would be impracticable to bring them all before the court. This latter provision applies indiscriminately to all actions, whether they involve questions of common interest or not.

I think the judgment should be reversed, and that the plaintiffs should have judgment upon the demurrer, with liberty to the defendants to answer upon payment of costs.

TOBIN v. PORTLAND MILLS COMPANY.

Supreme Court of Oregon. 1902.

41 Oregon, 269.

This is a suit by Ida M. Tobin, Mary Black, H. C. Davis, W. H. Gulliford, B. F. Allen, James A. Smith, John Davis, John M. Porter, Alexander Powers, and Robert Andrews against the Portland Flouring Mills Company and the Salem Flouring Mills Company, corporations, Stephen Williamson, Robert Balfour, Robert B. Foreman, Alexander Guthrie, Robert Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and James C. Black as administrator of the estate of Thomas J. Black, deceased, to compel the defendants to account for wheat received from Black.

It is alleged in the complaint, in substance, that plaintiffs bring this suit for themselves and all others similarly interested, whose consent to become parties plaintiff could not be secured, because of their number; that Thomas J. Black died intestate November 29, 1899, and the defendant James C. Black was appointed administrator of his estate, who duly qualified and entered upon the performance of his trust; that Black at the time of his death, and for about three years prior thereto, operated warehouses at Halsey and Cummings, in Linn county, and at Derry, in Polk county, during which time he received in storage as a warehouseman large quantities of wheat, for which he issued warehouse receipts and load checks; that at the time of his death there were outstanding receipts and checks for about

40,000 bushels of wheat stored at Halsey, of which all but about 15,000 was stored prior to 1899, and for wheat at the Cummings and Derry warehouses 16,000 and 20,000 bushels, respectively; that the wheat so stored was in part sacked, and the remainder in bins, and that the title thereto was in the plaintiffs and other depositors, who at no time gave their consent to remove any part of said grain; that at the time of Black's death there was stored at Halsey about 27,000 bushels, at Cummings 18,000, and at Derry 20,000 bushels, aggregating 58,000 bushels of wheat, which quantity lacked about 13,000 bushels of meeting the demands of those holding receipts and load checks; that the decedent while operating these warehouses shipped from time to time large quantities of wheat therefrom to the defendants, without the knowledge or consent of the plaintiffs or other depositors, and at the time of his death there was and now is held in store by the Portland Flouring Mills Company, at Oregon City, 9,296 29/60 bushels, by Balfour, Guthrie & Co. 2,446 20/60 bushels, and by the Salem Flouring Mills Company at Salem 3,977 45/60 bushels of this wheat, the property of the plaintiffs and of those for whom this suit is instituted; that, prior to the commencement thereof, plaintiffs demanded said wheat of the defendants, but they refused to deliver any part of it; that plaintiffs cannot state how much wheat was shipped by Black to the defendants, respectively, in 1899, nor how much during the preceding years, nor how much of the loss, if any, should be sustained by the depositors, nor can they do so until a complete accounting has been made.

Plaintiffs further allege, upon information and belief, that the three buildings were conducted as one warehouse, and that the decedent paid those of the depositors who from time to time sold grain to him out of the proceeds of grain shipped indiscriminately from said warehouses; that the estate of the intestate is insolvent, and unless the plaintiffs and those in behalf of whom this suit is instituted can trace the grain so shipped, and now in the possession of said defendants, and wrongfully withheld by them, they are without remedy; that there are from 100 to 250 depositors who hold receipts and load checks for wheat stored in said warehouses, and that it would be impracticable, and necessitate as many suits as there are depositors, to ascertain the amount of the loss, and how much each should sustain in

case the defendants are permitted to retain the wheat so delivered to them; and that a receiver should be appointed to take charge of said warehouses, in order to protect the rights of the several depositors.

A demurrer to the complaint on the ground of nonjoinder of parties plaintiff and misjoinder of parties defendant, improper joinder of causes of suit, and that the complaint did not state facts sufficient to constitute a cause of suit, having been overruled, the defendants the Portland Flouring Mills Company and the Salem Flouring Mills Company answered separately, denying the material allegations of the complaint, but admitted that they had received the quantities of wheat alleged in the complaint, on account of which they had made advances, and averring that, without knowledge or notice that any other than Black had any right to said wheat, they acted in good faith, and allege that he was the owner thereof, and had authority to ship the same, and to give liens thereon for said advances. * * *

Replies put in issue the allegations of new matter in the answers, whereupon a trial was had, and the testimony taken, from which the court found that there were at the time of Black's death outstanding receipts and checks for wheat received and stored at the warehouse at Halsey, 40,881 bushels, belonging to 101 depositors, stating their names, and giving the quantity of wheat deposited by each; that Black had shipped from said warehouse without the consent of the depositors 11,475 53/60 bushels of wheat, leaving only 29,306 47/60 bushels; that of the wheat so shipped, the Portland Flouring Mills Company received 8,424 bushels, and the Salem Flouring Mills Company 3,051 54/60 bushels, of the value of 49 cents per bushel,—and decreed that the plaintiffs recover from the Portland Flouring Mills Company $4,126.76, and from the Salem Flouring Mills Company $1,495.20, to be paid into court for distribution by the receiver among the plaintiffs and those for whose benefit the suit was instituted, as the court should thereafter determine. From which decree the Portland Flouring Mills Company and the Salem Flouring Mills Company appeal.

Mr. Justice MOORE, after stating the facts, delivered the opinion of the court:

It is contended by appellants' counsel that the depositors of wheat in the warehouses are not so numerous as to entitle

the plaintiffs to represent them, and that the court erred in decreeing a recovery of any wheat, or of the value thereof, in favor of any person other than the plaintiffs. That part of the decree which requires the appellants to pay into court the sums awarded, to be distributed by the receiver to those for whose benefit the suit was instituted, is sought to be justified by invoking section 385, Hill's Ann. Laws Or., which is as follows: "Of the parties to the suit, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."[1] The averment of the complaint calling this statute into requisition is as follows: "The plaintiffs, for cause of suit against the defendants, allege that they bring this suit in their own names for themselves and on behalf of all others similarly situated and interested in the subject-matter of the suit; and plaintiffs allege, and it will more fully appear from the allegations of the complaint hereinafter contained, that it is impracticable to unite all the parties in interest herein, because they are too numerous, and scattered over such an expanse of territory that their consent to the institution of this suit cannot be first had and obtained." The wheat so deposited in the warehouse when commingled belonged to the depositors, who were tenants in common thereof, having such an undivided interest therein as the quantity stored by each bore to the amount de-

[1] This provision allowing actions to be prosecuted or defended by one or more as representing a class, in the two cases specified therein, is found, in practically identical language, in most of the codes. See *Alaska*, Carter's Ann. Codes, 1900, Code Civ. Pro., § 39; *Arizona*, Rev. Stat., 1901, § 1313; *Arkansas*, Kirby's Digest, 1904, § 6008; *California*, Kerr's Codes, 1908, Code Civ. Pro., § 382; *Colorado*, Rev. Stat., 1908, Code Civ. Pro., § 12; *Connecticut*, Gen. Stat., 1902, § 619 (somewhat different provision); *Idaho*, Rev. Codes, 1908, § 4105; *Indiana*, Burn's Ann. Stat., 1908, § 270; *Iowa*, Code, 1897, § 3464; Kansas, Gen. Stat., 1909, § 5630; *Kentucky*, Carroll's Codes, 1895, § 25; *Minnesota*, Laws, 1905, § 4053; *Montana*, Rev. Codes, 1907, § 6491; *Nebraska*, Comp. Stat., 1911, § 6610; *Nevada*, Comp. Laws, 1900, § 3109; *New York*, Chase's Code Civ. Pro., 1910, § 448; *North Carolina*, Revisal of 1905, § 411; *North Dakota*, Rev. Codes, 1905, § 6818; *Ohio*, Gen. Code, 1910, § 11257; *Oklahoma*, Comp. Laws, 1909, § 5570; *South Carolina*, Code of Laws, 1902, Code Civ. Pro., § 140; *South Dakota*, Rev. Codes, 1903, Code Civ. Pro., § 89; *Utah*, Comp. Laws, 1907, § 2917; *Washington*, Rem. & Bal. Codes, 1910, § 190; *Wisconsin*, Stat., 1898, § 2604; *Wyoming*, Comp. Stat., 1910, § 4326.

posited. *Brown v. Northcutt,* 14 Or. 529, 13 Pac. 485; *Hamilton v. Blair,* 23 Or. 64, 31 Pac. 197. If Black shipped to the appellants any of the wheat that belonged to the depositors, without their consent, whereby a deficiency occurred in the quantity so commingled, rendering it impossible for a depositor to show the extent of his loss, a court of equity could afford relief by bringing all the parties before it, and doing complete justice between them, by ascertaining the deficiency in the joint property, and decreeing a recovery of the grain, if it could be discovered, or, failing in that respect, apportioning the loss pro rata among the joint owners. *Dole v. Olmstead,* 36 Ill. 150, 85 Am. Dec. 397; *Greenleaf v. Dows* (C. C.), 8 Fed. 550.

The right of the plaintiffs to maintain this suit for all the parties interested in the subject-matter is based on the averment of the complaint to the effect that the depositors are so numerous as to render it impracticable to bring them all before the court. It is a familiar rule in equity that the rights of no person shall be adjudicated unless he is present or given an opportunity to be heard, and that, when a decree is rendered affecting any subject-matter, the rights of all persons immediately interested therein shall be protected as far as they reasonably may be. Judge Story, in his work on Equity Pleading (9th Ed. § 72), in speaking upon this subject, says: "It is the constant aim of courts of equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject-matter of the suit, so that the performance of the decree of the court may be perfectly safe to those who are compelled to obey it, and also that future litigation may be prevented. Hence the common expression that courts of equity delight to do justice, and not by halves." Courts of law require no more parties to an action than those immediately interested in the subject-matter, but in equity all persons, including those remotely interested therein, may be joined, and are often necessary parties. Story, Eq. Pl. § 76. The same author, speaking of certain deviations from the rule, says: "The most usual cases arranging themselves under this head of exceptions are (1) where the question is one of a common or general interest, and one or more may sue or defend for the benefit of the whole; (2) where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the

rights and interests of the whole; (3) where the parties are very numerous, and although they have, or may have, separate, distinct interests, yet it is impracticable to bring them all before the court." Id. § 97. Section 385, Hill's Ann. Laws Or., is a copy of section 119 of Howard's New York Code, except the word "suit" in the copy takes the place of the word "action." * * *

The latter clause of section 385, in effect, enacts the third exception to the rule in equity, in respect to the necessity of making all persons immediately interested in the subject-matter parties, omitting therefrom, however, the words, "and although they have, or may have, separate, distinct interests." This omission cannot mean that the legislative assembly intended thereby to limit the third exception to cases in which the very numerous parties mentioned had a joint and indivisible interest in the subject-matter of the suit, for to give the statute such construction would render the exception superfluous, as the preceding clause of the section extends the second exception to that very class of parties, but limits it to a less number. It is manifest that the language so omitted was explanatory only, and is implied from the first exceptions in the statute, thus rendering the words omitted unnecessary; and hence the statute, instead of amending the exceptions to the rules of equity in respect of parties, is a legislative recognition thereof. The decisions of the courts of equity must be examined to determine when these statutory exemptions are applicable. Judge Story, in speaking of the third exception to the general rule of equity in respect of parties, where they are very numerous, says: "In this class of cases there is usually a privity of interest between the parties, but such privity is not the foundation of the exception. On the contrary, it is sustained in some cases, where no such privity exists. However, in all of them there always exists a common interest or a common right, which the bill seeks to establish and enforce, or a general claim or privilege, which it seeks to establish or to narrow or to take away. It is obvious that under such circumstances the interests of persons not actual parties to the suit may be in some measure affected by the decree, but the suit is nevertheless permitted to proceed without them, in order to prevent a total failure of justice." Story, Eq. Pl. (9th Ed.) § 120. Mr. Pomeroy, in his work

on Code Remedies (3d Ed. § 389), in commenting upon the second statutory exemption, almost identical with the third exception to the general rule of equity in respect to parties, says: "The second case depends entirely upon the number of persons who should, according to the ordinary rule, be plaintiffs or defendants. The single essential element is the impracticability of bringing all the parties before the court, on account of their great number. The language does not in terms require any question of common or general interest to this great number, but it is difficult to conceive of an action in which a very large number of persons should be capable of joining as plaintiffs,—so large that it would be impracticable to bring them all actually before the court, —unless the question to be determined was one of common or general interest to them all. It evidently follows, therefore, from the customary nature of litigations, that these two cases described by the statute are in practice constantly united. They constantly run into each other. In fact, it seldom if ever happens that a suit arises which falls strictly within the terms of the second case, and not within those of the first."

If it is to be assumed that each depositor had such a common interest in the wheat alleged to have been shipped by Black to the defendants, so that the plaintiffs were competent to represent them, and were authorized to institute and prosecute this suit in their behalf, and conceding that 101 depositors, by reason of an exercise of the court's discretion, come within the designation of "very numerous parties," the question to be considered is whether it was impracticable to bring them all before the court. Each depositor made a voluntary affidavit, which was admitted in evidence over the defendant's objection and exception, showing the quantity of wheat he had stored in Black's warehouse at Halsey, and 35 of the depositors appeared as plaintiff's witnesses at the trial, several of whom testified that they were anxious to share in the results of the suit, if the wheat shipped to the defendants, or its value, could be recovered, but only one depositor expressed a willingness to bear any part of the expenses incident to the suit. The others who were interrogated on this subject either declined to answer the question, or denied any intention to bear any part of such expenses. A person materially interested in the subject-matter of a suit may, against his will, be made

a party defendant, but we know of no rule whereby he can, without his consent, be joined as plaintiff. The desire of a person to be joined as a party plaintiff is indicated by a willingness to bear his share of the expenses of the trial, and while 35 of the depositors were anxious to participate in the profits of the suit, if any were realized, 34 of them, tacitly, at least, expressed their unwillingness so to contribute, thereby manifesting their dissent to being joined as plaintiffs, notwithstanding which a decree is given in their favor; thus, in effect, making them parties plaintiff against their will. Besides this, the 101 depositors, having made voluntary affidavits of their respective claims for wheat deposited at Black's warehouse at Halsey, could, if they so desired, have expressed their assent to be joined as plaintiff, thereby demonstrating the practicability of bringing them all before the court. If the depositors had not been interrogated in respect to their willingness to pay their part of the expenses, the law would probably have presumed that, as they were anxious to secure their share of the grain alleged to have been shipped to the defendants, they were also willing to contribute their part of the expenses incurred in recovering it, or its value; but their testimony dispels such presumption, if it could ever have been invoked. Judge Story, in his work on Equity Pleading (9th Ed., § 135a), in speaking of making all persons materially interested in the subject-matter parties, says: "When all the persons in interest can be made parties, and the decree must affect their interest, there seems to be a sound reason for insisting upon a strict adherence to the rule." In the case at bar the decree necessarily affects all the depositors, and, as they could have been made parties to the suit, the court erred in overruling the demurrer interposed on that ground, and in failing to bring before it all the depositors.

* * * * * * * * * * *

SECTION 3. JOINDER OF DEFENDANTS.

(a) In Contract Actions.

SUNDBERG v. GOAR.

Supreme Court of Minnesota. 1904.

92 Minnesota, 143.

BROWN, J.: This action was commenced in February, 1900, to recover upon a bond alleged to have been executed by defendants to secure the faithful performance by defendant Goar of his duties in the matter of winding up the affairs of a copartnership. The cause of the action accrued some time in 1894, but the action was not commenced until the date stated in 1900. The complaint is in the usual form, and sets up the execution of the bond by defendants (Goar as principal and the other defendants as sureties), default in its conditions, and demands judgment for the amount therein stated. Defendants interposed an answer on March 8, 1900, in which they alleged that the bond declared upon in the complaint was a joint, and not a joint and several, bond; that it was executed by the defendants and one Charles F. Peterson jointly; that Peterson was then living, residing in Kittson county, within the jurisdiction of the court, but had not been made a party to the action, nor served with the summons therein. Defendants further allege that by reason of the nonjoinder of Peterson there was a defect of parties defendant, and insisted that the action be abated and dismissed.

* * * * * * * * * * *

* * * The obligation, the foundation of the action, was the joint bond of defendants and Peterson, and not their joint and several contract. Under the common-law rule of practice in force in this state when this action was commenced, it was necessary that all persons jointly liable be made parties to the action, and a failure to do so was fatal, if objections were seasonably made. *Fetz v. Clarke,* 7 Minn. 217; *Johnson v. Lough,* 22 Minn. 203; *Davison v. Harmon,* 65 Minn. 402, 67 N. W. 1015; *Pfefferkorn v. Haywood,* 65 Minn. 429, 68 N. W. 68. And a joint judgment only could be rendered, except where the individual de-

fense of one of them released him, in which case judgment against the remaining defendants was proper. This rule has been changed, it is true, by our statutes, which now provide that parties to a joint obligation shall be jointly and severally liable. Chapter 303, p. 563, Gen. Laws 1897.[1] Under that statute the parties may be severally sued, or a several judgment entered, but the act expressly provides that it shall not apply to joint contracts existing at the time of its passage. This contract was entered into prior to the passage of that statute, and is governed by the rules of the common law, and is not affected by the statute. The common-law rule was founded in a purpose to protect persons jointly liable, and to secure to them the right of contribution in case judgment was ordered against them. If a joint judgment were recovered, and one of the defendants compelled to pay it, he could, in turn, compel his co-defendants to reimburse him to the extent of their portion of the liability. But where all persons jointly liable were not made parties, this right of contribution was lost, for the cause of action was held merged in the judgment, and all persons who were not parties released, and discharged from liability. The rule therefore required that all be made parties to the action, and that a joint judgment only could be had. Within the rule Peterson was an indispensable party, and his absence fatal to plaintiff's recovery.

* * * * * * * * * * *

[1] Similar statutes are found in a number of states: *Arkansas*, Kirby's Dig., § 6010; *Colorado*, Code Civ. Pro., § 13; *Iowa*, Code, 1897, § 3465; *Kansas*, Gen. St., 1909, § 1641; *Kentucky*, Code, 1895, § 27; *Missouri*, Ann. St., 1906, § 892; *Minnesota*, Rev. Laws, 1905, § 4282; *North Carolina*, Revisal of 1905, § 413.

COX v. MADDUX.

Supreme Court of Indiana. 1880.

72 Indiana, 206.

WOODS, J.: Suit by the appellees against the appellant upon the following instrument, viz.:

"$800.00. CINCINNATI, Feb. 8, 1870.

"One day after date we promise to pay to the order of

Maddux Brothers eight hundred dollars, payable at ....., value received. HUTCHINSON & COX."

The appellant answered, admitting the execution of the note, that on the 8th day of December, 1873, the appellees brought suit thereon in the U. S. District Court, for the District of Kansas, against Hutchinson alone, and recovered a judgment against him, to which suit the appellant was not made a party.

To this answer the appellees replied that at the time said suit was brought, and judgment obtained, the appellant was a non-resident of Kansas, and a resident of Arkansas. A demurrer to this reply was overruled, and upon this ruling alone the appellant has assigned error.

That a judgment taken against one of the joint makers of a note or contract merges the cause of action and bars a separate action against the other maker or makers, is well settled law. * * *

There are, however, exceptions to this rule. Where one of two joint debtors has died, a judgment against the survivor does not bar proceedings against the estate of the other. *Devol v. Halstead,* 16 Ind. 287.

Another exception is where the joint makers of the contract are not residents of the same state, or all within the process of any court in which the suit could be brought. The plain reason for these exceptions is that the holder of the obligation should not be deemed to have waived his claim or remedy against any maker, by reason of a separate suit and judgment against another maker, when a joint suit was impossible. See *Root v. Dill,* 38 Ind. 169; Freeman on Judgments, 193, sec. 234.

It seems to be clear that the U. S. District Court for the District of Kansas, wherein the judgment was obtained against Hutchinson, had no jurisdiction over the person of the appellant, Cox, who resided in the State of Arkansas. * * *

The court committed no error in overruling the demurrer in question.

Judgment affirmed, with costs.[1]

[1] *Accord:* Tally v. Ganahl (1907), 151 Cal. 418.

LOUSTALOT v. CALKINS.

Supreme Court of California. 1898.

120 California, 688.

GAROUTTE, J.: This appeal is prosecuted from the judgment, without a bill of exceptions. The action is brought upon a negotiable promissory note against A. C. Calkins, J. B. Libeu, and J. W. Calkins; and a joint and several judgment was rendered against them. They now appeal, and rely upon two grounds for a reversal of the judgment: (1) The demurrer of J. W. Calkins to the complaint should have been sustained.* * *

The demurrer of J. W. Calkins declares there is a "misjoinder of parties defendant, in that J. W. Calkins, an alleged and supposed guarantor, is joined with the principal promisors." * * * Section 3117 of the civil code provides: "One who indorses a negotiable instrument before it is delivered to the payee is liable to the payee thereon as an indorser." Tested by this section of the code, the facts here alleged plainly place the defendant J. W. Calkins in the position of an indorser of the note. In many jurisdictions he would be termed an anomalous or irregular indorser.

In speaking as to parties who may be joined as defendants, the code of civil procedure (section 383) declares, "Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff." By a liberal construction of this provision, it may be fairly said that an indorser, such as this defendant, Calkins, is a party to the promissory note. It is said in *Riggs v. Waldo*, 2 Cal. 487, "Each one who writes his name upon it is a party to it, and, from its original character, each party to it is an original undertaker." The object of this section of the law is directed solely to the avoidance of a multiplicity of actions, and we see no substantial objection to the application of the rule to a case like the one at bar. Upon an examination of the authorities from other states having statutory

provisions substantially similar to the one found in our code, we find those authorities preponderating to the effect that a guarantor and the maker of a promissory note may not be joined as parties defendant; but that question is not directly before us, and we pass it by for that reason. In this state, from its earliest judicial history, the makers and indorsers of negotiable promissory notes have been joined as parties defendant, and no question as to the correctness of the practice has ever been suggested. For this reason alone we feel constrained to give the statute a construction which it has tacitly borne for so many years. See *Riggs v. Waldo, supra; Pierce v. Kennedy,* 5 Cal. 138; *Ford v. Hendricks,* 34 Cal, 673; *Jones v. Goodwin,* 39 Cal. 493; *Fessenden v. Summers,* 62 Cal. 484; *Young v. Miller,* 63 Cal. 302. The demurrer was properly overruled.[1]

* * * * * * * * * * *

[1] Similar statutes are found in almost all of the code states.

In the absence of statute each defendant severally liable must be sued in a separate suit. Thus, in Hodges v. Nalty (1899), 104 Wis. 464, which was an action upon a subscription, the court said: "The liability of each subscriber is a several liability, and not a joint liability with the other subscribers, and hence is to be enforced in an action at law against him alone."

(b) In Tort Actions.

TURNER v. HITCHCOCK.

Supreme Court of Iowa. 1866.

20 Iowa, 310.

DILLON, J.: * * * 1. The injury sued for is a tort wholly unconnected with contract, and in such cases the well settled and undisputed common-law rule as to *parties defendants* is very succinctly and correctly stated by Mr. Chitty (1 Plead. 99): "If several persons jointly commit a tort, the plaintiff in general has his election to sue all or some of the parties jointly, or one of them separately; because a tort is, in its nature, a separate act of each individual." *S. P. Guille v. Swan,* 19 Johns. 381; *Livingston*

v. Bishop, 1 Id. 290; *Wright v. Lathrop,* 2 Ohio 33. And consequently the non-joinder of part of the wrong-doers cannot be pleaded in abatement or defense. Id.; 2 Hill on Torts, 441, pl. 9, and cases. The revision has altered the common law rule which required all *joint debtors* to be sued (Rev. sec. 2764; *Bovill v. Wood,* 2 M. & S. 23; 1 Pars. on N. & B. 247), but has made no alteration of the rule in relation to *torts.*

Although the liability is thus separate as well as joint, the injury sued for is an *entirety.* The injury is single, though the wrongdoers may be numerous.

2. Whether separate actions can be maintained against the several joint tort-feasors for the same trespass, is a question upon which the authorities differ.

Chitty lays it down that they cannot. 1 Plead. 79, 101. But in this country the contrary has been frequently decided. *Livingston v. Bishop,* 1 Johns. 290; *Wright v. Lathrop,* 2 Ohio 33; *Baker v. Lovett,* 6 Mass. 78; *Page v. Freeman,* 19 Mo. 421; *Knott v. Cunningham,* 2 Sneed (Tenn.) 204; *Ellis v. Betzer,* 2 Ohio 89; *Gehee v. Shafer,* 15 Texas 198; *Blaune v. Cocheron,* 20 Ala. 320; and see *Bird v. Randall,* 3 Burr. 1345; *Morton's Case,* Cro. Eliz. 30.

But the cases all agree (see on this point those last cited) that there can be but *one satisfaction,* even though there be several verdicts or judgments.

* * * * * * * * * *

MILLARD v. MILLER.

Supreme Court of Colorado. 1907.

39 Colorado, 103.

The appellee, plaintiff below, instituted this suit before a justice of the peace to recover from appellants the value of certain pasturage claimed to have been wrongfully taken and appropriated by them. From a judgment for $100, defendants appealed to the County Court. Upon the trial in the County Court the evidence disclosed the following facts: On the 12th day of December, 1900, H. J. Heckler leased to the plaintiff the S. W. ¼ and the N. E.

¼ of section 19, and the N. E. ¼ of section 29 in township 40, range 10, until March 1, 1904. The lease, inter alia, contained the following provision: "Not subject to release without consent of first party, and subject to sale of land at any time. * * * He further agrees * * * to give to party of first part two-fifths of all the grain raised; and further agrees to deliver said grain in the granaries on said land free of all expenses to first party."

In April, 1902, Heckler sold and conveyed the land in section 19 to Charles Millard, and the land in section 29 to Mrs. Katherine Millard. The plaintiff went on and seeded the land in 1902, and when he had cut and threshed the crop he delivered to Charles the rent grain from section 19, and to Frank Millard the rent grain from section 29. Thereafter Charles Millard appropriated to his own use the pasture on section 19, and Frank appropriated to his use the pasture on section 29. The trial court rendered judgment against Charles Millard for $100, and against Frank Millard for $40, and judgment against both for costs. From this judgment, the defendants prosecute this appeal.

Mr. Justice GODDARD delivered the opinion of the court:

Whether the plaintiff is entitled to recover the full value of these respective pastures from the defendants in a proper action depends upon the construction to be given to the terms of the lease which we think, under the circumstances, remained in force between these parties for that year. That the plaintiff is not entitled to any relief in this action is too plain to admit of controversy. The liability, if any, against these defendants is several, and must be availed of, if at all, in separate actions. In appropriating the use of the respective pastures, they acted separately. There was no co-operation between them, or community in the wrongdoing alleged, and therefore, under the well-settled rule, they cannot be used jointly. At page 562, subd. "b," 15 Enc. Pl. & Pr., the doctrine on this subject is concisely stated as follows: "Persons who act severally and independently, each causing a separate and distinct injury, cannot be sued jointly, even though the injuries may have been precisely similar in character and inflicted at the same time. A joint tort is essential to the maintenance of joint action. For separate and distinct wrongs in no wise connected by the ligament of a common

purpose, actual or implied by law, the wrongdoers are liable only in separate actions, and not jointly in the same action." Mr. Pomeroy, in his work on Code Remedies (4th Ed.), at section 209, after stating the general rule to the effect that those who have united in the commission of a tort are liable to the injured party without any restriction upon his choice of defendants against whom he may proceed, says: "In order, however, that the general rule thus stated should apply, and a union of wrongdoers in one action should be possible, there must be some community in the wrongdoing among the parties who are to be united as codefendants; the injury must in some sense be their joint work. It is not enough that the injured party has, on certain grounds, a cause of action against one for the physical tort done to himself or his property, and has, on entirely different grounds, a cause of action against another for the same physical tort; there must be something more than the existence of two separate causes of action for the same act or default, to enable him to join the two parties liable in the single action. This principle is of universal application."

* * * * * * * * * * *

For the foregoing reasons, the judgment is reversed, and the cause remanded, with directions to dismiss the action.[1]

Reversed.

Chief Justice STEELE and Mr. Justice BAILEY concur.

[1] In Smith v. Day (1901), 39 Ore. 537, two of the defendants were negligently blasting rock near a wharf, and the third defendant negligently allowed its boat, upon which plaintiff was a passenger, to lie at the wharf while the blasting was in progress; and it was held that the negligent acts were independent and the third defendant could not be joined with the other two.

In Wm. Tackaberry Co. v. Sioux City Service Co. (1911), — Iowa —, 132 N. W. 945, a number of defendants had severally constructed piers or other buildings on the banks of a stream in such a manner that the flow of water was so impeded as to cause plaintiff's premises to be flooded. It was the combined effect of all the buildings which produced the injury. But it was held that the liability of each defendant was several and they could not be joined. This case contains an exhaustive study of the question of joint liability in tort.

FORTMEYER v. NATIONAL BISCUIT COMPANY.

Supreme Court of Minnesota. 1911.

116 Minnesota, 158.

START, C. J.: Appeal by the defendant National Biscuit Company from an order of the district court of the county of Ramsey overruling its demurrer to the complaint upon the ground that several causes of action are improperly united therein. The allegations of the complaint, here material, are to the effect following:

The defendant McMillan Company is the owner of the premises described in the complaint, which front upon Eighth street, in the city of St. Paul. The defendant Biscuit Company is the lessee of the premises. The defendant city more than five years ago opened, graded, and paved the street in front of the property, and constructed a stone sidewalk along the south side of the street in front of the property, and opened it for public use and travel. More than five years ago the city authorized the owner of the property to construct an areaway in and under such sidewalk and make an opening therein, and the same was thereafter and more than five years ago so constructed, and has ever since been maintained and used by the defendant the Biscuit Company as the occupant and lessee of the premises. The opening so made in the sidewalk was covered by two iron shutters working upon hinges which extend about an inch above the level of the sidewalk and the shutters, and were during all the times mentioned dangerous obstructions in the sidewalk. The Biscuit Company has so been the lessee and occupant of the premises for more than five years, during which time it has so maintained and used the opening in the sidewalk and the shutters, including the hinges. All of the defendants knew of the dangerous condition of the hinges for a long time prior to the time when plaintiff received the injuries herein complained of. Each of the defendants at all times stated carelessly and negligently caused and permitted the hinges to be in the condition stated, and they negligently failed to make the same safe. The plaintiff, while walking along

the sidewalk tripped and stumbled over the hinges, and was thereby personally injured.

The contention of the appellant is that the complaint does not allege a joint tort, and that this case is ruled by the case of *Trowbridge v. Forepaugh*, 14 Minn. 133 (Gil. 100). If the question presented by the demurrer be considered and determined on principle, disregarding mere verbal logic, and without reference to the case relied upon, we are of the opinion that there was in this case no misjoinder of causes of action. The plaintiff has only one cause of action, which is for the recovery of damages by reason of the defect in the sidewalk. Each defendant owed a duty to the traveling public, including the plaintiff, to remove the nuisance in the sidewalk which caused her injury. Now, if the allegations of the complaint are true, then she may maintain her action against all of the defendants—against the city, because it authorized the creation of the unsafe condition of the sidewalk and negligently permitted such condition to continue; against the owner of the premises, because it created the unsafe condition, or nuisance, in the public street to be utilized in connection with the premises, and passed them on to its lessee in that condition; against the lessee, because it continued to maintain and use the opening in the sidewalk, with its defective shutters and unsafe condition, or, in other words, it is a continuer of the nuisance. *Landru v. Lund*, 38 Minn. 538, 38 N. W. 699; *Ferman v. Lombard Co.*, 56 Minn. 166, 57 N. W. 309; *Isham v. Broderick*, 89 Minn. 397, 95 N. W. 224. Why should the plaintiff, having but one cause of action and entitled to only one satisfaction of it, be compelled to proceed against the defendants separately, and bring three separate actions, instead of one, for the same cause of action?

It is urged that by joining them in the same action they might be embarrassed in making their defense, but by answering separately, as they have the right to do, the court can and will protect the rights of each. It has been urged by some courts that, if all the parties liable in a case like the one at bar are joined in the same action, their right of contribution will be lost. This claim is purely technical, for courts look at the substance of the transaction, not its form, and if in this case the defendants were sued separately, they would be entitled to contribution among them-

selves, the right would not be lost by their joinder in the same action. *Mayberry v. Railway Co.*, 100 Minn. 79, 110 N. W. 356, 12 L. R. A. (N. S.) 675; 10 Am. & Eng. Ann. Cas. 754. The joinder of all the parties in one action in such a case as this avoids a multiplicity of suits and conserves the orderly administration of justice. We can conceive of no sound reason why they should not be so joined. The fact that they did not, by their joint act, conduce to the plaintiff's injury, which seems to have been the only basis for the decision in the case of *Trowbridge v. Forepaugh*, affords no substantial reason why they should not be joined in the same action upon a cause of action for which each is liable, for the several acts of negligence of the defendants concurred in causing the injury. We accordingly hold, overruling *Trowbridge v. Forepaugh*, that several causes of action are not improperly united in the complaint.

Order affirmed.[1]

[1] In Kansas City v. File (1899), 60 Kan. 157, an electric light company knowingly permitted a broken electric light wire to lie in the street for several weeks, which fact was also known to the city, and it was held that there was sufficient community in the negligence of the company and the city to permit them to be joined in an action for injuries sustained by plaintiff through touching the wire. Doster, C. J., dissented, relying largely upon Trowbridge v. Forepaugh, 14 Minn. 133, overruled in the Fortmeyer case, *supra*. The case of Pugh v. Chesapeake & Ohio Ry. Co. (1897), 101 Ky. 77, contains an exhaustive review of authorities sustaining joint liability.

(c) In Equitable Actions.

LEYDEN v. OWEN.

St. Louis Court of Appeals, 1910.

150 Missouri Appeal, 102.

GOODE, J.: A petition in the nature of a bill in equity was filed against James G. Owen, Andrew F. Howe, Hattie Owen, and James G. Owen, Jr., but was dismissed before judgment as to all the defendants except James G. Owen; that is to say, dismissed voluntarily by plaintiff against Andrew Howe, Hattie Owen, and James G. Owen, Jr., and a decree taken against James G. Owen alone.

In February, 1902, Andrew F. Howe and Elmo C. Owen (brother of James G. Owen, husband of Hattie Owen and father of James G. Owen, Jr.) were joint patentees and owners of the entire right, title, and interest in and to letters patent of the United States, No. 678,619, for an improvement in ball-bearing journal boxes for railroad cars. The patentees were without money to prove the invention by tests and thereby give it a commercial value, and to procure money for that purpose, on February 19, 1902, they entered into a contract with plaintiff Thomas Leyden, which * * * provided that Leyden should advance to said Howe and Owen the money needed to make ball-bearing journal boxes and equip one car, to an amount not in excess of $5,000. Other terms occurred in the contract not relevant to the present case, and then followed in substance these: The parties to the contract, Leyden, Howe, and Owen, agreed they would organize and form a stock company after the test had been made of the device, put the capital stock of the company at $250,000 par value, issue non-assessable shares to the amount of $20,000 par value to Leyden in consideration of the $5,000 advanced by him as aforesaid, issue shares to the par value of $135,000 to Howe and Owen, to be divided equally between them in consideration of their assigning their right, title, and interest in and to the letters patent to the corporation, agreed further the remainder of the capital stock of the par value of $95,000 should be placed on the market and the proceeds turned into the treasury of the corporation to form a working capital. * * *

Shortly afterward Elmo C. Owen, one of the patentees, became dangerously ill and had to undergo an operation for appendicitis in a hospital in Chicago, Ill., and he died from the operation. Immediately before it was performed and while he was on the operating table, he executed an instrument to his brother James G. Owen of the following tenor:

"For and in consideration of $1 and other good and valuable considerations, receipt of which is hereby acknowledged, I hereby transfer, assign, and set over to James G. Owen, my undivided half interest in and to a certain patent and invention No. 678,619, on a ball journal bearing for railroad and street cars, etc., issued to A. F.

Howe and E. C. Owen, July 16th, 1901. In trust for the following purposes:

"First. Said James G. Owen shall organize a corporation and transfer to said corporation my undivided interest in and to said patent and invention, and the transfer by said A. F. Howe to said corporation of his undivided one-half interest in and to said patent and invention, in consideration for the entire capital stock; that is, for said entire patent interest of said Howe and Owen.

"Second. To transfer to T. F. Leyden 10/250 of said capital stock. Said Howe to transfer from his capital stock a like proportion, both in consideration of the advance by said Leyden of $5,000 as demanded.

"Third. From the stock in said trustees' hands 5/500 to be transferred to W. W. Wilcox. Said Howe to transfer a like amount in consideration of services rendered.

"From the balance of said capital stock in said trustees' hands, he shall retain as his own personal property $\frac{21}{250}$ out of said capital stock and said Howe shall transfer a like amount to said James G. Owen in consideration of services rendered and to be rendered in the organization and promotion of said company. The balance shall be held by him in trust for Mrs. Hattie Owen and child, James G. Owen, Jr., as their interest may appear, during the full term of patent, re-issues, etc. Dated Chicago, Illinois, April 29th, 1902. Elmo C. Owen. Attest: F. M. Williams. A. F. Howe.

* * * * * * * * * * *

"James G. Owen, trustee. James G. Owen. A. F. Howe."

After the death of Elmo C. Owen, his brother, James G. Owen, defendant herein, formed a corporation under the laws of the state of Maine, known as the Howe & Owen Ball-Bearing Company, with a capital stock of $1,000,000, divided into 10,000 shares of the par value of $100 each, and stood ready to assign to said corporation the half interest in the letters patent which had been assigned to him by his brother, Elmo C. Owen. He demanded of Howe that the latter assign to the corporation Howe's interest in the letters patent, all in accordance with the contract of April 29, 1902. Howe refused to make the assignment and the result was the commencement of a suit in equity by the Howe & Owen Ball-Bearing Company

against Howe in the United States Circuit Court of this district, to compel him to do so. To that suit plaintiff Leyden was a party, as was also a man named Wilcox, who had a slight interest in the patent, not necessary to be noticed in the present case. The litigation in the federal courts ended in the affirmance by the federal Court of Appeals, of a decree compelling Howe to assign his interest in the letters patent to the corporation, directing the corporation to issue to James G. Owen, as trustee for Hattie Owen and James G. Owen, Jr., and to Andrew F. Howe, each 5,000 shares of stock of the par value of $500,000 in full payment for the assignment to the company of their respective interests in the letters patent. The decree further directed both Howe and James G. Owen to transfer to Thomas Leyden in conformity to the contract of April, 1902, 10/250 of the shares received by said Howe and James G. Owen, or 20/250 in all, directed Howe to transfer to James G. Owen $\frac{21}{250}$ of the stock received by said Howe from the corporation, and decreed that James G. Owen should hold as his own property of the shares issued to him by the corporation, the like number of shares. It was provided the decree should not be binding upon Howe unless he accepted the stock adjudged to him, and there is no proof he did. This matter will be understood better upon reading the opinion delivered in the case of *Howe v. Howe and Owen Ball-Bearing Company,* 154 Fed. 820, 83 C. C. A. 536.

It will be perceived there are material differences between the contract of February 19, 1902, entered into by plaintiff Thomas Leyden on one side, and Andrew Howe and Elmo C. Owen on the other, and the contract or instrument executed by Elmo C. Owen on April 29th and consented to by Andrew Howe. By the instrument of April 29th it was provided Leyden should receive from Andrew Howe 10/250 of the capital stock of the proposed corporation and the like amount of said capital stock from James G. Owen, trustee for Hattie and James G. Owen, Jr., wife and child of Elmo C. Owen; whereas in the contract of February 19, 1902, it was provided Leyden should receive $20,000 worth of full paid, nonassessable stock of the corporation, whose capital stock should be $250,000. Moreover, the contract of the earlier date provided that $95,000 out of the $250,000 of the capital stock should be

treasury stock; whereas the later contract said nothing about treasury stock. Under the earlier agreement, to which only Leyden was a party, there was to be issued only $155,000 of stock of which Leyden would receive $20,000, or 20/250 or 12 28/31 per cent. of the issued stock. According to the agreement of April 29, 1902, to which he was not a party, he would receive 10/250 of the amount of shares of stock issued to Andrew Howe and to James G. Owen as trustee, and as each of these parties received 5,000 shares of stock, Leyden would receive from each 200 shares, or 400 shares in all, or 4 per cent. of the entire capital stock of $1,000,000. That is to say, under the earlier contract Leyden was entitled to receive 12 28/31 per cent. of the issued stock; whereas under the later contract he was entitled to receive 4 per cent. The petition in this case sets out the contracts substantially as we have related them, averring Leyden complied fully with his agreement to advance $5,000 for use in testing the ball-bearing journal boxes as the proof shows he did; alleges the two contracts according to their terms and that all parties intended the instrument of April 29th should provide regarding Leyden's interest in the corporation and the number of shares he should receive, exactly as had the instrument of February 19th, but that in the haste and confusion due to the imminent peril of Elmo C. Owen, a mistake was made in drawing the later paper, and it provided contrary to the will and intention of the parties concerning Leyden's shares.

* * * * * * * * * * *

The theory of the suit is that plaintiff is entitled to receive of the capital stock of the Howe & Owen Ball-Bearing Company, which was placed at $1,000,000 under the contract of April 29, 1902, the same proportion of shares he would have been entitled to, if the capital stock had been placed at $250,000, pursuant to the contract entered into on February 19th, between him, Elmo C. Owen, and Howe; that is to say, he is entitled to 12 28/31 per cent. of the capital stock; that this was the intention of the parties to the contract of April 28th, and they intended so to provide, but through inadvertence failed to follow the terms of the previous contract. This suit is really intended to enforce specifically plaintiff's rights under the first contract on the ground that the second one was executed by all the parties to it, includ-

ing defendant James G. Owen, with full knowledge of the existence of the first contract and of plaintiff's rights thereunder. It is contended for defendant the first contract cannot be enforced against him because he was no party to it, but we hold otherwise; for it was clearly established he knew well its terms when he accepted the trust and other terms of the instrument of April 29th; was clearly established, too, that at said time it was the intention of Elmo C. Owen, Howe, and defendant, to accord plaintiff the same proportionate rights and interests in the corporation when the provisions of that instrument were carried out, he would have received if the provisions of the earlier contract had been carried out, and that no one thought of depriving him of any right or interest. Defendant James G. Owen and Andrew F. Howe both understood matters that way, and probably plaintiff would have been given his full interest if a controversy had not sprung up between Howe and Owen following Howe's refusal to assign his interest in the letters patent as he had agreed to do. His obligation was enforced by the federal court, as we have seen, but for some reason plaintiff's stock was not issued to him; wherefore this suit was instituted.

Whoever was given and accepted any interest under the contract of April 29th, having acquired the interest with knowledge of the rights of plaintiff, is answerable to a suit for their enforcement. *Farrar v. Patton*, 20 Mo. 81; 26 Ency. Law (2d Ed.) 126, and cases cited; Waterman, Spec. Perf. § 64; Bispham, Equity (6th Ed.) § 365; 2 Story, Eq. Jur. (3d Ed.) § 788 et seq.

The suit was filed against all the proper and necessary parties, including Andrew Howe, Hattie Owen, and James G. Owen, Jr., but, as stated, was dismissed as to every one except the present defendant (appellant James G. Owen), and the question is whether judgment could be given against him only. In treating this inquiry it is well to recur to the general rules concerning parties to suits in equity, and it will be found the chief principles underlying those rules are these: It is the policy of equity to bind everybody by the decree in a suit who has any right or interest in the subject or object of the suit, which, if he was left free, he might thereafter assert to the prejudice of the parties bound to perform the decree; that is to say, to leave no one except from the force of the decree who by subsequently bringing

forward some claim against the parties to the litigation, might cause them to suffer a loss in consequence of having done what the court ordered. It is also the policy of equity to do justice as a whole instead of by piecemeal. But, afforded the opportunity to be heard in defense of his rights, those doctrines have given rise to the rule 'that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree, which shall bind them all.'' Still treating the same matter, the text we have been quoting from continues: "By this means, the court is enabled to make a complete decree between the parties, to prevent future litigation by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it or to others, who are interested in the subject-matter of the decree, which might otherwise be grounded upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto.'' Story, Eq. Plead. (10th Ed.) § 72; *Gregory v. Stetson,* 133 U. S. 579; *Barney v. Baltimore City,* 6 Wall. 280; *Poor v. Clark,* 2 Atk. 515. The rule in England regarding the necessity of making all persons parties who are materially interested, has been relaxed less than it has been in this country, because of the difference in the territorial jurisdiction of equity courts in the two countries. Story, *supra.* Sometimes it was found impossible to make every person in interest a party without ousting jurisdiction of the particular state or federal court over the litigation and thereby preventing a measure of justice from being decreed, when certain of those persons might be omitted as parties without prejudice to their rights. By reason of this fact the practice in the United States permits the omission from the suit of persons who would be necessary parties, if within reach of the court, when they are beyond its reach, if their interest in and relation to the property involved is such that a decree can be pronounced in the case without affecting their rights, yet settling the interests and rights of persons who can be brought before the court. *Cameron v. McRoberts,* 3 Wheat. 591, 4 L. Ed. 467; *Shields v.*

Barrow, 17 How. 130, 140; *Barney v. Baltimore,* 6 Wall. 280, 284; *Chadbourne v. Coe,* 51 Fed. 479, 2 C. C. A. 327.

The rule that persons who are materially interested, but not in such a way that no decree can be pronounced without affecting their interest, may be omitted from the record as parties when it is impossible to obtain jurisdiction over them, has been developed to prevent the failures of justice which otherwise would often occur. Story, § 77 *et seq.* But it must be borne in mind the exception to the general rule that all persons materially interested must be made parties, is allowed on account of inability to obtain service within the jurisdiction of the court on some persons who have an interest in the subject-matter, and only when their interest is of a kind that "will not be prejudiced by the decree, and when they are not indispensable to the just ascertainment of the merits of the case before the court. * * * But if such absent persons are to be active in the performance or execution of the decree; or if they have rights wholly distinct from those of the other parties; or if the decree ought to be pursued against them; then the court cannot properly proceed to a determination of the whole cause without their being made parties. And under such circumstances, their being out of the jurisdiction constitutes no ground for proceeding to any decree against them or their rights or interests; but the suit, so far at least as their rights and interests are concerned, should be stayed; for to this extent it is unavoidably defective. In many instances the objection will be fatal to the whole suit. In others, it will not prevent the court from proceeding to the decision of other questions between the parties actually before it, even though such a decision may incidentally touch upon, or question, the rights of the absent parties." Story, § 81, and cases cited.

With these principles in mind let us proceed with the inquiry regarding who were "indispensable parties" to this case, according to the federal nomenclature, or, what is the same thing, who were "necessary parties," according to the term commonly used in equity procedure. If Andrew Howe was outside the territorial jurisdiction of the court below, he could be omitted as a party defendant, because it was possible to render a decree settling the rights of plaintiff against James G. Owen and his cestuis que trustent Hattie Owen and James G. Owen, Jr., without prejudicing

the rights or interests of Howe. It is true one-half the stock to which plaintiff is entitled must come out of Howe's interest; but the latter can be pursued by plaintiff in an independent suit in the jurisdiction where he resides; hence we think he is not an indispensable party.

The inquiry will be directed next to the effect of the dismissal of the action as to Hattie Owen and James G. Owen, Jr., for whom defendant held in trust all the stock acquired by him from Elmo C. Owen by the instrument of April 29th, except his (defendant's) individual portion. According to the decree of the federal court, his personal interest is $\frac{315}{250}$ of the shares going to Andrew Howe and the same proportion of the shares of Elmo C. Owen, or $\frac{125}{250}$ of the capital stock of the corporation, amounting, as we calculate, to 1,733⅓ shares of the par value of 173,333⅓. We have said the instrument of April 29th declared defendant's portion of the stock should be transferred to him from the holdings of Elmo C. Owen and Andrew Howe for services rendered and to be rendered by defendant in the promotion of the company. It will be observed said instrument did not say any part of the shares plaintiff Leyden would receive should he be allotted out of the shares to defendant for services. On the contrary, said instrument provided that half of plaintiff's shares should be transferred to him from the interest of Elmo C. Owen and half from the interest of Howe (making a like provision as to the shares of Wilcox) that from the balance of the stock left in defendant's hands after those allotments, he should retain the shares to which he was entitled personally for services, and should hold the final balance in trust for Hattie Owen and James G. Owen, Jr. It follows that whatever shares plaintiff is entitled to receive from those transferred to defendant by Elmo C. Owen will be taken out of the shares defendant holds, not in his personal capacity, but as trustee for Hattie Owen and James G. Owen, Jr.; in other words, will cut down the number of shares the latter persons will enjoy as beneficiaries of the trust created by the instrument of April 29th.

The judgment of the court below compels defendant to hold shares to the value of $64,516, as trustee for plaintiff, until defendant shall have executed and delivered to plaintiff an assignment of shares of that par value. If it is in-

tended said proportion of stock shall be taken from the personal holdings of defendant, the decree is without warrant in law, because plaintiff has no claim against defendant personally, but only as trustee. If the shares are to be taken from those held by defendant as trustee for Hattie Owen and James G. Owen, Jr., they will be deprived of shares to that amount by a judgment given in a suit to which they are not parties, and wherein they had no opportunity to be heard. This decree materially affects their rights and interest in the subject-matter of the litigation and therefore they are indispensable parties; for we have seen that all persons, either legally or beneficially interested, should be made parties. Certain exceptions are allowed to this rule when the beneficiaries of a trust are very numerous, or when the trustee is empowered by the instrument settling the trust to dispose of the trust property in an absolute manner, without the consent of the cestuis que trust, and in other cases, like executors and administrators, whom the law invests with authority to represent the distributees and creditors of estates. None of those exceptions is applicable to the instant case, and so it must be governed by the ordinary rule about the necessary parties to suits respecting trust property when brought against trustees; and this is "that the cestuis que trust (or beneficiaries), as well as the trustees, are necessary parties. * * * The trustees have a legal interest and therefore they are necessary parties. The cestuis que trust (or beneficiaries) have the equitable and ultimate interest to be affected by the decree, and therefore they are necessary parties." Story, § 207; see, also, section 208; *Tysom v. Applegate,* 40 N. J. Eq. 305; *Boyden v. Partridge,* 2 Gray (Mass.) 190; *Bank v. Crafts,* 145 Mass. 444.

The instrument of April 29th conferred on defendant no power to dispose of the shares he held in trust for Hattie Owen and James G. Owen, Jr., but merely said he should hold the balance of the shares left in his hands after Leyden, Wilcox, and himself had been allotted their proportion "in trust for Mrs. Hattie Owen and child, James G. Owen, Jr., as their interests may appear during the full term of the patent, re-issues," etc. If defendant was compelled by the decree in this suit to transfer to plaintiff a portion of the shares held in trust for said beneficiaries, the latter might thereafter call him to account, for their rights would

not be concluded by the decree in the present case. That is to say, the decree would force defendant to proceed in reference to the trust property in a manner which would expose him to a suit hereafter by the cestuis que trust, and this is contrary to the procedure in equity. 1 Danial, Chancery, § 284; *Wendell v. Van Renselear,* 1 John. Ch. (N. Y.) 344; *Stebbins v. St. Anne,* 116 U. S. 386, 6 Sup. Ct. 418; *McArthur v. Scott,* 113 U. S. 340, 394. The rules we are invoking in regard to the necessity of making the beneficiaries parties, are in force under the code system of procedure when the action is in the nature of a suit in equity. Bliss, Code Plead. (3d Ed.) § 109b; *Sampson v. Mitchell,* 125 Mo. 217; *Dillon's Adm'r v. Bates,* 39 Mo. 293; *Voorhis v. Gamble,* 6 Mo. App. 1; *Miller Lumber Co. v. Oliver,* 65 Mo. App. 435, 438.

We consider this to be eminently a case in which a court should refuse to decree the relief prayed, in the absence from the record of persons whose property would be taken in the enforcement of the decree; wherefore the judgment is reversed. All concur.[1]

[1] "Where the subject of the action has become so complicated and entangled that the rights of the parties are involved in doubt, and it is difficult to determine who is liable, and who is not, except upon a full hearing in which all the persons in any way affected or interested are before the court, equity permits the joinder of all those so related to the controversy, and who have a common interest in some one or more branches of it." Demarest v. Holdeman (1901), 157 Ind. 467, 473.

The matter is quite largely within the sound discretion of the court. Murray Drug Co. v. Harris (1907), 77 S. C. 410.

CASTLE v. CITY OF MADISON.

Supreme Court of Wisconsin. 1902.

113 Wisconsin, 346.

This is an equitable action, brought to abate a dam on the Catfish creek at the outlet of Lake Mendota, alleged to be owned and maintained by the defendant city of Madison. The complaint at considerable length sets out that plaintiffs are the owners of lands which are overflowed by said dam, the circumstances under which the dam was built, an

abandonment of the purpose of which it was built, and the fact that the city is maintaining it at a greater height than it had any right to, which increases the overflow of plaintiffs' lands, and causes them damage. The prayer for relief is that the dam be abated, and that the city be enjoined from obstructing the natural flow of the stream from the lake. The city answered that Lake Mendota was a navigable body of water about 25 miles in circumference. The answer then puts in issue some of the allegations regarding ownership and overflow of the lands mentioned in the complaint; sets out at length the circumstances and authority by which the dam was built in 1849 or 1850, the raising of the water in the lake about four feet, and a continuous maintenance of said head at a uniform level ever since. It alleges title in the defendant by mesne conveyances from the original owners, denies raising a head of water higher than it has been kept for more than 40 years. As a special defense the city then set up that the dam so erected was for the purpose of raising the level and improving the water power of the lake, and which caused the water to set back and spread and overflow in many places, and made new margins and boundaries for the lake, and that the city's grantors had obtained a prescriptive right to such overflow, which right the city now possesses; that some 20 or more of its streets lead to said lake, and since said overflow the city has graded and adjusted said streets in accordance with said increased level. That the east shore of the lake is covered with many costly homes and summer cottages, and many valuable improvements have been made with reference to the new level, and much money expended to cause said property to conform thereto, and that very many of the owners of said property have obtained a prescriptive right to require said level to be maintained. The answer gives the names of a large number of property owners who have made such improvements, who have demanded of the city that it protect their interests in the maintenance of said dam, and alleges that they are proper parties to this action, and necessary to a complete determination of the interests involved. Later the city obtained an order to show cause why the property owners named should not be made parties defendant. On December 3, 1900, the court made an order denying such motion. Later a number of property owners made petition setting out their interest in the litigation,

and asking to be made parties, and the court made an order allowing them to intervene in their own behalf, but not for other riparian owners. Such interveners made answer putting many of the allegations of the complaint in issue, and by way of abatement set up the interests of other landowners bordering on the lake, whose rights were involved in this litigation, to the number of 256. The list gave the names and addresses of all the owners of land shown by the records to be interested in the suit, and asked that they be made parties to the action. A further answer in bar of the action was made, but which is not material to the present inquiry. The plaintiffs demurred to the matter set up in abatement on the ground that it appears on the face of the answer that the parties sought to be brought in were not proper or necessary parties to the action. The demurrer was heard by the late Judge Elliott sitting for Judge Siebecker, and was sustained on the ground that the former order of December 3, 1900, was res adjudicata. An order sustaining the demurrer and dismissing the plea in abatement and requiring the defendant interveners to pay $10 costs was entered September 27, 1901.

* * * * * * * * * * *

BARDEEN, J.: The appeal from the order of December 3, 1900, having been heretofore dismissed, we have here only to consider the appeal from the order sustaining the demurrer to and dismissing the answer in abatement. By that answer the interveners sought to bring in as parties all persons owning property on the shores of Lake Mendota affected by the overflow caused by the dam at the outlet of the lake. The court below sustained the demurrer on the sole ground that, because the court had theretofore denied the right of the city to require such additional parties to be brought in, it was res adjudicata, and binding upon the court in all subsequent proceedings in the case. The court was evidently in confusion in the matter. The former order had been made before the interveners had been made parties to the suit. They had had no day in court on the question involved. They were seeking to protect their own rights, and to prevent further harassing litigation. Conceding, for the purpose of the argument, that their answer was well founded, to say that their rights had been concluded and cut off by proceedings had in the action before they had an opportunity to be heard would be little less

than absurd. Their rights in the litigation were not dependent upon or in privity to those of the city. * * *

We come now to the question of whether, under the facts disclosed, these various property owners are necessary and indispensable parties to this litigation. We are well satisfied that the allegations of the answer are sufficient to indicate that such adjoining owners are substantially in the position assumed by the plaintiff in *Smith v. Youmans,* 96 Wis. 103. There it was held that the artificial state or condition of flowing water, founded on prescription, becomes a substitute for the natural condition previously existing, from which a right arises on the part of those interested to have the new condition maintained; or, to be more definite, the plaintiffs who had, for the period of prescription, enjoyed the advantages of the artificial level of water created by the defendants' dam, and in reliance upon its maintenance had improved their property at great expense, and conformed it to the changed conditions, had an easement on their part to have the waters kept at such higher level, and the right to prevent the lowering thereof to their injury by the owner of the dam, at least so long as he did not abandon or surrender his easement to flood the lands. The recent case of *Kray v. Muggli,* 86 N. W. 882, 54 L. R. A. 473, decided by the supreme court ofMinnesota, expressly follows the Smith case, and demonstrates that the doctrine announced is not new in the jurisprudence of this country. The demurrer admitting the facts to be as stated, the question immediately arises whether the property owners who are affected by the removal of the dam are necessary and indispensable parties to the litigation. The question of who are and who are not proper and necessary parties to pending litigation has given rise to very much discussion in the books, and more or less refinement may be found in the decisions. Our statute (section 2602, Rev. St. 1898) says:

"All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, except as otherwise provided by law."

Section 2603 declares that:

"Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein."

By section 2604 those who are until in interest must be

joined as plaintiffs or defendants. If one who should be joined as plaintiff will not consent, he may be made a defendant. When the question is one of common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one may sue or defend for the benefit of the whole. Under the technical rules of the common law it was not considered possible for two or more persons to be united as plaintiffs in the same action upon a contract unless they were, for all the purposes of that action, equally united in interest, unless the benefit of the contract belonged to them as a unit, and unless the right in them was created at the same time and by the same act. And the same rule was applied to the joinder of defendants. The common law knew nothing of defendants against whom a judgment for the entire amount of debt and damages was not to be rendered, nor of defendants who become liable at different times and upon separate instruments. Pom. Code Rem. § 60. The revolution contemplated by the code has been, in a measure, defeated by attempting to interpret it according to common-law principles. It was deemed that it had not abolished the ancient legal conceptions as to parties and joint rights and liabilities, and hence the code was fenced around by a series of decisions on this subject rendering it much less revolutionary than its framers evidently designed. It has been said—and the statement appeals to us with considerable force—that these ancient rules of the common law ought to have but meager weight as against the plain and obvious purpose of the code to simplify and remove the difficulties of the former practice. The rules of practice under the régimé of equity were in every way different from these legal doctrines. The legal notion of a necessary unity in the rights of the plaintiffs or in the liabilities of defendants was not known or recognized in equity. The great range of precedents on this subject may be found in any text-book on equity jurisprudence. It is plain from a cursory reading of the sections of our statue mentioned that they are broad and comprehensive enough to cover the entire field of ancient equity rules. They are without exception or limitation, and usually have been construed as being of equal breadth and scope with the rules of equity as administered in England when applied to suits in equity. It is perhaps to be regretted that the early expositions of

the code should have found it necessary to apply its language in one way as to legal actions, and the same language in another way as to suits in equity. The natural and fundamental ideas which seemed to control in suits in equity were that the suit should be prosecuted by the party really in interest, although there might be joined with him others who had an interest in the subject-matter and in the relief sought, and that all persons whose presence was necessary to a complete determination of the questions involved should be made parties, so that in one decree their rights, claims, interests and liabilities, however varying in importance or extent, might be adjudicated and enforced by the court. 1 Daniell, Ch. Pl. & Prac. 190, thus lays down the rule:

"It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested in the subject ought generally, either as plaintiffs or defendants, to be made parties to the suit, or ought, by service upon them of a copy of the bill or notice of the decree, to have an opportunity afforded of making themselves active parties in the cause, if they should think fit."

A discussion of this question by Chief Justice FULLER in *California v. Southern Pac. Co.*, 157 U. S. 229, is of the most helpful character. After stating that the court usually followed the former practice of the equity courts of England in analogous cases, he discusses the rule as to indispensable parties to a suit in equity. There are, it is said, three classes of parties to a suit in equity:

"(1) Formal parties. (2) Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed 'necessary parties;' but, if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. (3) Persons who not only have an in-

terest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

Many cases might be cited announcing the same rules in general terms. In view of these rules, an intimation by the Minnesota court in *Kray v. Muggli, supra,* that they were "aware of no rule of law under which all such parties could be compelled to join in such action," is not to be taken as establishing that such law does not exist. We gather from the cases that this idea is always prominent in the minds of the chancellor; that, if a person is so affected by the decree that his property interests are impaired or destroyed by its enforcement, he is an indispensable party to the litigation, and it cannot proceed without his presence, unless the case is brought within the rule of one representing a class. This latter question is not in this case. By the ruling appealed from the court held, in effect, that the other property owners were not even necessary parties to the action, and, that being so, the attempt of the interveners to bring them in must fail. We have already shown that the landowners bordering on the lake have a prescriptive right, assuming the allegations of the answer to be true, to have the city keep the water of the lake up to its artificial level, so long, at least, as it has not abandoned or surrendered its easement to flow the lands. If this action should proceed to judgment against the city, an attempt to enforce it would be a direct invasion of their rights, and injurious to their property. Not being in court, or being in any way represented therein, they are not bound by such judgment, and the city might be called upon to defend innumerable suits involving the same question. Not only that, but each landowner might be called upon in any or all of these suits to assert his rights, and litigation without end ensue. The direct object of the statute and all rules of equity procedure is to prevent any such needless and unjust complications. It is not only for the interest of the city, but for the plaintiffs and interveners as well, to have one suit settle the entire question, so that when the final judgment is entered the rights of all concerned can be ascertained and adjudged. In that respect the order appealed from was plainly wrong upon the reasons given for

its entry, and as plainly wrong when the answer is considered on the merits. It is argued that it is impracticable to bring in all the riparian owners, and that all interests are represented in the suit as it is. This contention cannot be sustained. It is not shown that it is impracticable to bring all the owners into the suit. We shall not assume that it is because they are numerous. Further, the owners who have been let in are not here in a representative capacity. The order making them parties allows them in on their own behalf alone, and not on behalf of any other riparian owner. If it be shown that there is difficulty in making the numerous owners defendants, and the court believes that some may be proceeded against as representatives of a class under the statute, so that the litigation as carried on will end the controversy as to those thus represented, the court may so determine when the merits of the answer in abatement are considered. But see *Linden Land Co. v. Milwaukee Electric Ry. & Light Co.*, 107 Wis. 493.

* * * * * * * * * * *

BY THE COURT: * * * The order sustaining the demurrer to the answer is reversed, and the cause is remanded, with directions to overrule the demurrer, and for further proceedings according to law.

DISBROW v. CREAMERY PACKAGE MANUFACTURING COMPANY.

Supreme Court of Minnesota. 1908.

104 Minnesota, 17.

JAGGARD, J.: Plaintiff, the inventor of certain patented creamery devices, who was about to procure other patents, was engaged in the manufacture and sale of churns and the like with certain persons to be referred to herein as "his associates." A series of transactions with the defendant company and another company, which involved various assignments of the patents issued, the taking out of new patents in the name of a third person, the promise to pay royalties, and the creation of indebtedness, resulted

in business complications which were solved by the execution of certain contracts. Plaintiff, his associates, and defendants were parties to these contracts and joined in their execution. Plaintiff subsequently came to know of certain facts in connection with the contracts, and what had been done under and concerning them, which he thought entitled him to substantial relief from the courts. He was, however, largely in the dark. His counsel quite frankly stated that in consequence he framed the complaint here tested so as to operate as "a blunderbuss." It stated the facts constituting plaintiff's causes of action as fully as they were known, so as to secure to plaintiff, the inventor, all the relief, consistent or inconsistent, he was possibly entitled to, either in law or in equity. More particularly, it alleged facts intended to show fraud, which, on the one hand, in law entitled the plaintiff to recover damages, in a large sum, and which, on the other hand, entitled plaintiff in equity to the reformation of the contracts by way of partial cancellation, at least, to holding defendants as trustees ex maleficio, and to an accounting. The prayer for relief accordingly sought the recovery of damages, partial rescission, responsibility of defendants as trustees ex maleficio, an accounting, and "other relief." Defendant interposed a demurrer, which, in its final form, was addressed only to the failure to make parties plaintiff "the associates" who were parties to and who signed the agreements. The propriety of the order of the trial court sustaining that demurrer is the question presented upon the appeal.

* * * * * * * * * * *

4. The final and essential controversy involves certain assumptions for present purposes only, which, we understand, are agreed upon, viz., that, apart from the question as to the defect of parties, the complaint stated good causes of action in tort and in equity and was not demurrable for want of facts (see 8 Current Law, 1386), and that the parties to the cause of action in tort are proper and sufficient. The ultimate question on these assumptions is whether the fact that the parties named in the demurrer were not necessary parties to the action in tort was good reason why the demurrer should not be sustained because they were necessary and missing parties to the equitable proceeding; that is to say, in one aspect of this proceeding,

in which it is viewed as an action in tort, plaintiff is entitled to some relief when suing alone, and in another aspect, in which equitable relief is sought, the trial court held that plaintiff was entitled to relief only by joining other parties. We are of opinion that under these circumstances the trial court properly sustained the demurrer.

The merit of common law, as distinguished from code, pleading, was that it tended directly to produce single and definite issues. It wasted no time in so doing. The party complaining must originally have proceeded either in law or in equity—if in law, in contract or on the tort, and by means of a definitely recognized form; and if in equity, under a recognized head of equitable jurisprudence. The present complaint it would have promptly rejected or pruned. It will sometimes happen that when, under the code, one of these "omnibus" or 'blunderbuss" complaints is sought to be utilized, substantially the same result is finally reached as at common law. It has proved impossible to make the law of remedies independent of the law of substantive rights. Each had its origin in history. Each has incorporated that historical development. The alteration in the law of remedies by the code must necessarily have a limited effect, unless there was a corresponding change in the law of substantive rights. The code did not purport to alter the law substantive. In the absence of previous correction of such a pleading, there comes, moreover, a time under the practice in this state when the case must go on the court or the jury calendar. It cannot go on both at the same time. This necessitates a definite theory on plaintiff's part. If the case goes on the jury calendar, plaintiff may have a cause of action in tort or in contract. If the case goes on the court calendar, it is controlled by ordinary principles of equitable jurisprudence, in aid of which issues may, in proper cases, be framed and submitted to a jury, and tried in law. This practice is largely for convenience. It may happen that an equity case may get on the jury calendar, and that the court, who is at once a chancellor and a judge at law, may none the less, for example, reform a contract and submit damages for its breach as reformed by the jury. But in no tenable view is the primary distinction between legal and equitable causes of action and kinds of relief abolished, or rules of inconsistency destroyed. Plaintiff is, of course,

bound by his own election. When his pleading is confused or inconsistent, and a motion has been made to place it on a particular calendar, he is equally bound by the proper construction of the trial court as to what cause or causes of action his pleading must be regarded as having set forth. *Todd v. Bettingen,* 102 Minn. 260, 113 N. W. 906.

This is entirely consistent with the more liberal view of code practice, viz.: "When the plaintiff, clothed with primary rights, both legal and equitable, growing out of the same cause of action on the same transaction, is entitled to an equitable remedy, and also to a further legal remedy, based upon the supposition that the equitable relief is granted, and he sets forth in his complaint or petition the facts which support each class of rights, and which shows that he is entitled to each kind of remedy, and demands a judgment awarding both species of relief, the action will be sustained to its full extent in the form thus adopted. He may, on the trial, prove all the facts averred, and the court will, in its judgment, formally grant both the equitable and the legal relief." Pomeroy, Remedies and Remedial Rights, p. 96, § 78. See *Guernsey v. American Ins. Co.,* 17 Minn. 104 (Gil. 83); *Montgomery v. McEwen,* 7 Minn. 351 (Gil. 276).

When this case in due course will come to be placed upon the calendar, it must go on the jury cases or court cases. If plaintiff should then elect to put it on the jury cases—that is, to sue in tort—no prejudice would result from an overruling of the demurrer. If, however, he should elect to put it on the court calendar—that is, to proceed in equity—then, if no demurrer had been interposed and sustained, defendant would be unable to complain of the defect of parties plaintiff; for, if a defect of parties plaintiff or defendant appears upon the face of the complaint, the objection addressed to that point must be taken by demurrer, or it is waived. Section 4129, Rev. Laws 1905. And see *Mason v. Insurance Co.,* 82 Minn. 336, 85 N. W. 13, 83 Am. St. Rep. 433. The defect of parties here appeared on the face of the complainant. Defendants were therefore properly upheld in their "notice that they insisted upon a statutory right." If the trial court had not sustained the demurrer, "the statutory right to de-

mur for lack of necessary parties would have ceased to be a shield and have become a pitfall for defendants."

* * * * * * * * * * *

Affirmed.

SECTION 4. BRINGING IN NEW PARTIES.

(a) When Necessary for Complete Determination of Suit.

STEINBACH v. PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Court of Appeals of New York. 1902.

172 New York, 471.

This action was brought to reform a policy of life insurance as to the name of the beneficiary, and to recover upon it as reformed.

Omitting the formal parts, the allegations of the complaint were that, "prior to the 19th of October, 1896, one Max Fehrman was indebted to the plaintiff (whose name was then Caroline Lampp, she having since married her husband William Steinbach) in divers sums of money which he was unable to pay. * * * And thereupon, and for the purpose of securing to the plaintiff the payment of the moneys, or a part thereof, then due and owing to her from said Max Fehrman, the defendant agreed with the plaintiff, in consideration of the premises, and of the payment by the plaintiff of the weekly premiums hereinafter mentioned, to issue a further policy of insurance upon the life of said Fehrman, for the benefit of the plaintiff, in the sum of two hundred and seventy dollars, and to make said policy payable to the plaintiff upon the death of said Fehrman.

* * * * * * * * * * *

"Upon the delivery of said policy of insurance to the plaintiff, the defendant, by its agent, stated to the plaintiff that the same was issued by the defendant in pursuance of the said agreement, and in conformity therewith, and

that by the terms of said policy the defendant did insure the life of said Max Fehrman, and did agree upon his death to pay the amount of said insurance to the plaintiff, upon her paying the premiums called for by the said policy, namely, twenty-five cents per week, and complying with the other conditions thereof; and said defendant did so state and represent to this plaintiff for the purpose of inducing this plaintiff to pay the said premiums, and made such representations intending that the plaintiff should rely thereon, and, relying thereon, should pay the said premiums accordingly.

* * * * * * * * * * *

"The said statements and representations were false and untrue. The said policy was not payable to this plaintiff as represented by the defendant, nor did the same conform to the said agreement, but instead was payable to the executors, administrators, and assigns of the said Fehrman, and gave this plaintiff no interest whatever in any moneys that might become due thereunder, and no rights whatever in respect to said money.

* * * * * * * * * * *

The relief demanded was that the name of the plaintiff be substituted in the place of the beneficiaries named in the policy, and that she have judgment upon the policy as thus reformed. The answer is substantially a general denial. No attempt was made by the defendant to raise the objection that there was a defect of parties defendant by demurrer or answer, but upon the trial, at the close of the evidence, its counsel moved to dismiss the complaint on the ground, among others, "that there is a defect of parties defendant here; the instrument that is sought to be reformed is payable to Max Fehrman or his executors, administrators, or assigns, and neither of those parties nor the next of kin are parties to the action." The motion was denied and the defendant excepted. The trial court found the facts substantially as alleged in the complaint, directed a reformation of the policy as therein demanded, and awarded judgment to the plaintiff thereon for the amount claimed. After affirmance by the appellate division, two of the justices dissenting, the defendant came here.

VANN, J. By the judgments below, the names of the beneficiaries in a policy of life insurance were stricken

out, and the name of a stranger substituted as sole beneficiary, without making the former parties to the action or giving them an opportunity to be heard. This has been done upon the ground that the insurance company, which is the sole defendant, waived the objection that there was a defect of parties defendant by not taking it either by demurrer or answer as provided by section 499 of the code of civil procedure. That section, however, must be read in connection with section 452, which provides that "the court may determine the controversy, as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in."[1]

The apparent inconsistency between these sections was the subject of controversy before the courts for a long time, but we think it was dispelled by the judgment in *Osterhoudt v. Board of Supervisors of the County of Ulster*, 98 N. Y. 239, 243. That was an action by tax-payers to vacate audits of town accounts for illegality and fraud, and to restrain the levy of a tax for their payment. The persons in whose favor the audits were made were not parties to the action, and, while the defendants omitted to raise the objection by demurrer or answer, they raised

[1] This provision is found in almost all the codes. *Alaska*, Carter's Ann. Codes, 1900, Code Civ. Pro., § 40; *Arizona*, Rev. Stat., 1901, § 1308 ("additional parties may be brought in by proper process either by plaintiff or defendant upon such terms as the court may prescribe."); *Arkansas*, Kirby's Digest, 1904, § 6011; *California*, Kerr's Codes, 1908, Code Civ. Pro., § 389; *Colorado*, Rev. Stat., 1908, Code Civ. Pro., § 16; *Connecticut*, Gen. Stat., 1902, § 621; *Idaho*, Rev. Codes, 1908, § 4113; *Indiana*, Burn's Ann. Stat., 1908, § 273; *Iowa*, Code, 1897, § 3466; *Kansas*, Gen. Stat., 1909, § 5633; *Kentucky*, Carroll's Codes, 1895, § 28; *Minnesota*, Laws, 1905, § 4069 (in different form, as follows: "Whenever it shall be made to appear, upon motion of the plaintiff in any pending action, or of any defendant in such action who has alleged a counterclaim or other ground for affirmative relief, that in order to a full determination of such action another should have been made a party defendant or plaintiff therein, the court, upon such terms as may be proper, shall order such additional party to be brought in, and may stay other proceedings in the action for such time as may be necessary for that purpose."); *Missouri*, Ann. Stat., 1906, § 658 (in slightly different form); *Montana*, Rev. Codes, 1907, § 6498; *Nebraska*, Comp. Stat., 1911, § 6613; *Nevada*, Comp. Laws, 1900, § 3112; *New York*, Chase's Code Civ. Pro., 1910, § 452; *North Carolina*, Revisal of 1905, § 414; *North Dakota*, Rev. Codes, 1905, § 6824; *Ohio*, Gen. Code, 1910, § 11262; *Oklahoma*, Comp. Laws, 1909, § 5573; *Oregon*, Lord's Laws, 1910, Code Civ. Pro., § 41; *South Carolina*, Code of Laws, 1912, Code Civ. Pro., § 143; *South Dakota*, Rev. Codes, 1903, Code Civ. Pro., § 95; *Utah*, Comp. Laws, 1907, § 2926; *Washington*, Rem. & Bal. Codes, 1910, § 196; *Wisconsin*, Stat., 1898, § 2610; *Wyoming*, Comp. Stat., 1910, § 4331.

it upon the trial, where it was overruled. In reversing the judgment rendered in favor of the tax-payers, we said: "Construing sections 452 and 499 together, their meaning is that a defendant, by omitting to take the objection that there is a defect of parties by demurrer or answer, waives on his part any objection to the granting of relief on that ground; but when the granting of relief against him would prejudice the rights of others, and their rights cannot be saved by the judgment, and the controversy cannot be completely determined without their presence, the court must direct them to be made parties before proceeding to judgment. When a defendant is sued alone upon a joint contract, if he omits to set up a nonjoinder of his co-contractor by demurrer or answer, judgment may pass against him alone, because judgment against one joint contractor will not prejudice the other, but may relieve him from liability. The other branch of the rule would be illustrated by an equitable action brought for the cancellation of a mortgage executed to two persons as mortgagees, in which only one of the mortgagees was made defendant. The court could not proceed to a decree for the plaintiff without the presence of the other mortgagee. The distinction is between those who are necessary parties and those who are proper parties merely. When persons who are necessary parties are not joined, the court will not proceed until they are brought in. * * * Under the code, the court is bound to take the objection when a proper case is presented."

It was further held that the persons in whose favor the audits had been made were necessary parties, because they were "primarily interested," and the judgment was reversed because they had not been joined.

Referring to section 452 in a still later case (*Mahr v. Norwich Union F. Ins. Socy.*, 127 N. Y. 452, 459, 28 N. E. 391), the court said: "While the statute does not in terms prohibit the court from determining the controversy unless all the necessary parties are brought in, that is impliedly commanded, and is the established practice in all equitable actions." Citing, among other cases, *Peyser v. Wendt*, 87 N. Y. 323; *Sherman v. Parish*, 53 N. Y. 483; *Van Epps v. Van Deusen*, 4 Paige 64, 25 Am. Dec. 516.

A court of equity always seeks to do complete justice, and to make its judgments so full and comprehensive as

to quiet the controversy in all its aspects and as to all persons. Thus every one who is compelled to obey its decrees is protected, further litigation is prevented, and the unseemly spectacle of inconsistent judgments rendered by the same court is avoided.

The plaintiff insists that the rights of the personal representatives of Max Fehrman are not prejudiced by the judgment appealed from, because they are not bound by it and can still recover upon the policy, notwithstanding the judgment of reformation rendered in this action. This might lead to inconsistent judgments and a double recovery, which is precisely what section 452 was designed to prevent. Moreover, the hazard of collecting a second judgment in favor of a different plaintiff against the same defendant upon the same cause of action might in some cases be an important consideration, and the remoteness of the risk in this case does not affect the principle. The court cannot know how great the risk may be, and hence should not permit it, even if it thinks it is remote. A complete determination of a controversy cannot be had when there are persons, not parties, whose rights must be determined, in form at least, at the same time that the rights of the parties to the action are determined. According to the policy under consideration, as it was written, the personal representatives of Mr. Fehrman are entitled to the proceeds, yet the judgment below, rendered without notice to them, takes the policy away from them and gives it to the plaintiff. They had a material interest in the subject-matter of the action, yet they were deprived of it without an opportunity to be heard, and were cast in judgment without being sued. While they were not bound by the judgment which does all this in form, still the determination of the controversy is necessarily incomplete because they are not bound. Such a judgment, although not binding, would affect the market value of the policy, and tend to prevent a disposition thereof, either absolutely or as collateral to a loan. There cannot be a complete determination as to which of two persons is the beneficiary of a life insurance policy without the presence in court of both. The personal representatives of Fehrman were necessary parties, and the court should have dismissed the complaint unless within a reasonable time they were brought in, not necessarily for the protection of the defend-

ant, as it had neglected its rights, but for their own protection, as well as the seemly and orderly administration of justice.

The judgment should be reversed and a new trial granted, with costs to abide the event.

HAIGHT, J. (dissenting): * * *

PARKER, C. J., and GRAY, and BARTLETT, JJ., concur with VANN, J. O'BRIEN and MARTIN, JJ., concur with HAIGHT, J.

Judgment reversed, etc.

CLAY COUNTY LAND COMPANY v. ALCOX.

Supreme Court of Minnesota. 1902.

88 Minnesota, 4.

START, C. J.: The Clay County Land Company is a domestic corporation having its principal place of business at Barnesville, in the county of Clay, with a branch office at Moorhead. On September 6, 1901, it commenced in the District Court, county of Clay, an action against Henry C. Alcox, the respondent herein, for the restitution of its offices at Moorhead, and to restrain them from using them. The respondent four days thereafter served an answer in the cause upon the appellant herein, Samuel A. Hoyt, a resident of the county of Ramsey. The answer denied the allegations of the complaint, and alleged that the appellant commenced the action in the name of the land company without authority, for his own benefit. It then alleged that the respondent and appellant were copartners under the firm name of the Clay County Land Company for the purpose of buying and selling real estate; that the prosecution of the business resulted in a profit of $7,500, one-half of which belonged to the respondent, but that the appellant had retained the whole thereof, and refused to account for or pay over the same. The answer prayed that the appellant be made a party to the action, that a receiver be appointed for the copartnership business, and that an accounting be had by the court, or under its direction. On the next day he procured from the District Court of the county of Clay an order return-

able on September 13, 1901, on the appellant to show cause why he should not be made a party plaintiff to the action and reply to the respondent's answer therein. On the return day the appellant appeared, not generally in the action, but for the purpose only of procuring a dismissal of the order on the ground that he was a resident of the county of Ramsey, and that the court was without jurisdiction to make him a party plaintiff. The trial court denied the appellant's motion to dismiss the order to show cause, and made its order that the appellant reply to answer of the respondent within 20 days, and, in default of such reply, that judgment for the relief demanded in the answer be rendered against him as if he had been made a party to the action in the first instance. * * *

We find it necessary to consider only the question whether the trial court erred in making its order compelling the appellant to appear as a plaintiff in the action and reply to the respondent's answer under penalty of having judgment entered against him for the relief demanded in the answer. * * *

The motion and order so compelling the appellant to appear and reply were made pursuant to the provisions of Gen. St. 1894, §§ 5178-5181, as amended by Laws 1895, c. 29. The only change made by the amendment is to provide for bringing in additional parties plaintiff as well as parties defendant. The statute now provides that whenever the plaintiff, or defendant, in case of counterclaim or a demand for affirmative relief, in any action shall discover that any party ought, in order to a full determination of such action, to have been made a party plaintiff or defendant therein, the court, if satisfied that such is the case, shall make its order bringing in such new party, and require him to answer the complaint, or reply to the answer, as the case may be. That is, it is only when the bringing in of other parties is necessary to a full determination of the controversy between the original parties tendered by the complaint, answer, or counterclaim that the court can compel them to come into the action as parties plaintiffs or defendants.

Now, the defendant's so-called counterclaim in this action tenders no issue between the original parties to the action for a full determination of which it is necessary that appellant should be made a party plaintiff. It is

simply an allegation of a cause of action wholly distinct from the cause of action alleged in the complaint, and with which the plaintiff has no connection. We have here a case where the defendant denied all of the allegations of the complaint, and alleged that the appellant commenced the action in the name of the land company without authority. This did not make it necessary to bring in the appellant as a party in order to secure a full determination of the controversy between the plaintiff and the defendant, for, if his answer was true, he was entitled to a judgment against the plaintiff on the merits. But the respondent, conceiving that he had an independent cause of action against the appellent, alleges it in his answer, and makes it the basis of the order compelling the appellant to reply to the answer and litigate the action with him in the county of Clay. In this way the original action is converted into one by the respondent against the appellant, the former being in fact the plaintiff and the latter defendant, whereby the appellant is deprived of his legal right to a trial thereof in the county where he resides. It needs no argument to support the conclusion that the statute authorizes nothing of the kind, and that there has been a miscarriage of justice in this case.

We therefore hold that the order of the district court making the appellant a party and requiring him to reply to the answer was reversible error, and that the action should have been dismissed as to him. * * *

The judgment is reversed, and the case remanded to the district court, with direction to dismiss the action as to the appellant without prejudice.[1]

[1] See Chapter V, Section 6, (d), *infra*, on Parties to Counterclaims.

(b) Intervention.

TAYLOR v. ADAIR.

Supreme Court of Iowa. 1867

22 Iowa, 279.

The question in this case relates to the right of Goff to intervene. The original action was brought by A. N. Taylor, the payee of two promissory notes, in the usual form, made by William Adair and George W. Adair, each dated May, 13th, 1863; one for $400 at one year, the other for $21 at three months from date. The petition was in the usual form. The Adairs were served, but made no defense. One E. P. Goff, as the executor of the estate of Charles Taylor, deceased, filed the following petition to be allowed to intervene, to wit:

"A. N. Taylor

v.

"William Adair & G. W. Adair

"In District Court of Butler County, Iowa.

"Your petitioner, Edwin P. Goff, executor of the estate of Charles Taylor, deceased, alleges that, on the 13th day of May, 1863, the said William Adair was indebted to the said Charles Taylor, deceased, in the sum of $421. That on said 13th of May, 1863, the said A. N. Taylor caused the said William Adair and G. W. Adair to execute and deliver to him the notes mentioned in plaintiff's petition; that the consideration for said notes was the said indebtedness to the said Charles Taylor, deceased. That the said A. N. Taylor never had any authority to take said notes in his own name. That said notes justly belonged to the estate of said Charles Taylor, deceased. That the said A. N. Taylor has no interest in said notes, except that the said A. N. Taylor has the legal title thereto. The said Edwin P. Goff further states that on the 7th day of July, 1863, he was appointed the executor of the estate of the said Charles Taylor, deceased, by the County Court of Linn county, Iowa, and that he is still the executor of said estate and acting as such. The said E. P. Goff, therefore, asks that he may be allowed to intervene in the above en-

titled cause and be permitted to become a party plaintiff, and that the judgment in said cause be rendered in favor of the said Edwin P. Goff, as executor of the estate of said Charles Taylor, deceased.

"EDWIN P. GOFF,

"As executor of the estate of Charles Taylor, deceased."

To the petition of intervention the plaintiff, A. N. Taylor, demurred, "for the reason that the said petition does not state facts sufficient to constitute a cause of action or of intervention. The petition admits that the plaintiff has the legal title to the note; that is sufficient and conclusive so far as this case is concerned, it being an action at law, and the petitioner (Goff) must go into equity if he has an equitable interest. The said Goff does not join in what is sought by plaintiff's petition."

Upon this ground the court sustained the demurrer to the petition of intervention, from which decision Goff appeals. The makers of the note interposing no defense, judgment was thereupon rendered against them in favor of the plaintiff, A. N. Taylor.

DILLON, J.: To the lawyer not thoroughly conversant with the sweeping and radical changes in procedure and practice made by the revision, the proposition that such an intervention as that sought in the present instance is allowable, would be not a little startling. But our code abolishes "the forms of all actions and suits heretofore existing," and declares that there shall be but one form of action—a civil action. A mistake as to whether the action should be at law or in equity is no longer fatal. If wrong, it may be changed without abatement or dismissal (Sec. 2616) and is waived by failure seasonably to move its correction. (Sec. 2619.) Uniformity of procedure is also the rule concerning the prosecution of civil actions. (Sec. 2620.) All prior forms of actions and pleadings are also abolished, and the rules of the code, and not those laid down by Stephen and Chitty, are the tests to determine the sufficiency of all pleadings. (Sec. 2872.) The defendant may plead as many defenses as he may have, whether legal or equitable; not only so, but he may set up as many setoffs, counter claims or cross demands as he may have, whether legal or equitable. New parties may be made, and all the machinery is provided to enable parties to adjust

their disputes and differences in one and the same action. (Sec. 2890 et seq.)

A design to avoid needless multiplicity of actions is everywhere apparent in the present system of procedure. Consonant with the other provisions of this system, are those giving and regulating the rights of *third parties* to intervene in a pending action. (Secs. 2930-32.)

Section 2930 is very broad. It enacts "That any person shall be entitled to intervene in an action who has an interest in the matter in litigation, in the success of either of the parties to the action, or an interest against both. An intervention takes place when a third party is permitted to become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendant in resisting the claim of plaintiff, or by demanding anything adversely to both the plaintiff and defendant."[1]

Applying this section to the case in hand, we first inquire whether Goff, as the executor of Charles Taylor, has "an interest in the matter in litigation." What was the matter in litigation? Clearly the debt which Adair owed. We say the debt rather than the note, for the debt is the substance of which the note is simply a memorial, or visible evidence. Now this debt is alleged, and on the record admitted, to be owing by Adair to Charles Taylor, and not to the plaintiff. If Charles or his executor had possession of the notes, though they are made payable to the plaintiff, he might, on showing his real ownership, sue thereon in his own name. *Cottle v. Cole,* 20 Iowa, 481, and cases there cited.

So, although plaintiff might sue in his own name on the notes, they being made payable to him, yet if they were in reality the property of Charles, the maker might avail himself of any defense he might have against Charles. These

[1] This is a common form of statute, found substantially as set forth here in the following codes: *Alaska,* Carter's Ann. Codes, 1900, Code Civ. Pro., § 41; *Arizona,* Rev. Stat., 1901, §§ 1278, 1279 (somewhat altered); *California,* Kerr's Codes, 1908, Code Civ. Pro., § 387; *Colorado,* Rev. Stat., 1908, Code Civ. Pro., §§ 22, 23; *Idaho,* Rev. Codes, 1908, § 4111; *Montana,* Rev. Codes, 1907, § 6496; *Nebraska,* Comp. Stat., 1911, §§ 6618, 6619, 6620; *Nevada,* Comp. Laws, 1910, § 3694; *North Dakota,* Rev. Codes, 1905, § 6825; *South Dakota,* Rev. Codes, 1903, Code Civ. Pro., § 96; *Utah,* Comp. Laws, 1907, § 2925; *Washington,* Rem. & Bal. Codes, 1910, § 202.

There are other special statutes found in some codes, providing for intervention in cases of attachment, replevin, etc., which it is not deemed necessary to set forth here.

considerations are advanced to illustrate how thoroughly the law penetrates beyond names and forms and externals, into the very substance and kernel.

Now if the plaintiff succeeds, he recovers that which, on the assumption of the truth of the petition of intervention, belonged to another; that which Charles or his representatives may sue him for and compel him to pay. He may be insolvent. He may, if he recovers the judgment, assign it. Why should the real owner of the debt not have the privilege of coming into court, and on establishing, as against the plaintiff, the right to the debt, directly recover it in his own name. This avoids multiplicity of actions, consequent delay and augmented costs. It cannot unduly prejudice the plaintiff. It may, as above suggested, be the only protection against the insolvency or fraud of the plaintiff. We have said that this cannot prejudice the plaintiff, for the court can prevent any unnecessary delay in the determination of the intervention issues.

We are not prepared to admit the truth of the proposition laid down in the demurrer, that the interest of Charles is of such nature as that it could be asserted against the plaintiff only in a court of equity.

Nor are we prepared to admit the further proposition, that, in a law action, an intervenor's "interest in the matter in litigation" must be a legal interest to entitle him to the benefit of the statute.

Without prolonging the discussion, we conclude by announcing it as the opinion of the court, that this is a case in which the appellant has shown that he has "an interest in the matter in litigation against both parties," a case in which he demands something adversely to both plaintiff and defendant." (Rev. Sec. 2930.) This interest is adverse to the plaintiff, as he claims against *him* the ownership of the note or debt. His interest is adverse to the defendant, since he claims to recover against *him* a judgment for the amount of the note.

The judgment of the District Court against the appellant is reversed, and the cause remanded for further proceedings. If the judgment in plaintiffs' favor against the defendant is not collected or paid to plaintiff, it, or the money, will be held to await the result of the determination of the issues between the plaintiff and the intervenor. If not before collected, and the intervenor is successful, the court

will order an assignment thereof to him. If before collected, and the intervenor prevails, the court will direct the money to be paid to him.

Reversed.

SMITH v. CITY OF ST. PAUL.

Supreme Court of Minnesota. 1896.

65 Minnesota, 295.

MITCHELL, J.: The city of St. Paul had taken by condemnation proceedings a tract of land for the purpose of opening a street, the compensation or damages awarded being one gross sum for the entire tract. The plaintiff brought this action against the city to recover the amount of the award, alleging that she was the owner of the entire tract. The St. Paul Trust Company and Mrs. Sache interposed "complaints in intervention," alleging that they respectively owned certain portions of the tract, and hence were severally entitled to a part of the award. To these complaints the plaintiff demurred on the ground that the facts stated did not constitute a ground of intervention. This appeal is from an order overruling the demurrers.

The contention of the plaintiff is that these parties had no right to intervene, under Gen. St. 1894, § 5273,[1] for the reason that they "would neither gain nor lose by the direct legal operation and effect of the judgment;" that any interest they might have in the property, or any claim they might have against the city, would be wholly unaffected by the result of a suit between the city and the plaintiff, *Lewis*

[1] This statute, appearing in Laws, 1905, as Sec. 4140, is as follows: "Any person having such an interest in the matter in litigation between others that he may either gain or lose by the direct legal effect of the judgment therein may serve a complaint in the pending action, at any time before the trial begins, alleging the facts which show such interest, and demanding appropriate relief against either or both of the parties. Such intervenor shall not be entitled to delay, and, if a continuance be occasioned by him, it may be granted at his expense. The ordinary rules of pleading shall govern, except that the court, in order to avoid delaying the trial, may shorten the time within which subsequent pleadings shall be served. All the issues shall be determined together, and if the intervenor's claim be not sustained he shall pay the costs resulting therefrom."

v. Harwood, 28 Minn. 428, 10 N. W. 586. If the action had been brought by plaintiff to recover an ordinary debt alleged to be due her from the city, or if the interveners had to rely exclusively upon the statute for their right to come into the action, the plaintiff's contention might be difficult to answer. But compulsory interpleading and voluntary intervention in an action originally between other parties were always known and recognized as ancillary remedies by means of which courts were enabled more conveniently and perfectly to adjudicate upon the ultimate rights of the parties in the subject-matter involved in the litigation, and thus award full and final relief in the further judicial proceedings to which these remedies were auxiliary. It is not to be supposed that the statute in relation to interpleader and intervention was intended to abolish these ancillary remedies in cases where they were previously authorized, and to limit them exclusively to cases falling strictly within the terms of the statute.

Condemnation proceedings under the city charter are in rem against the land. The award becomes a fund standing in the place of the land, and whoever owns the land is entitled to the award. If the award is paid over to one as owner who is not the true owner, he will be liable to the true owner in an action for money had and received. Lewis, Em. Dom. § 627; *Tamm. v. Kellogg,* 49 Mo. 118; *Meginnis v. Nunamaker,* 64 Pa. St. 374; *Harris v. Howes,* 75 Me. 436; *In re Eleventh Ave.,* 81 N. Y. 436. Hence, if the whole of the award should be paid over to the plaintiff, and the fact should be that she was not entitled to the whole of it, but that the interveners were severally entitled to a part of it, they could maintain actions against her to recover their shares. The fact that they might, at their election, have a remedy against the city, would not deprive them of this right of action. If this is so, why may they not intervene in this action, in order to have the award apportioned, and to recover their share? Why should they have to wait until the money was paid over to the plaintiff, and then sue her? Where the duty is devolved on the court or other tribunal before which the condemnation proceedings were had, to distribute or apportion the award among those entitled to it, there is no question of the right of any claimant to appear and assert his right to it, or of the court or other

tribunal to require any such claimant to appear and establish his claim.

We do not think that the fact that the statute gives a party a right of action against the city to recover the amount of the award at all alters the rule. The question before the court still is, who are entitled to the award? Doubtless the city might, in a proper case, require the plaintiff and other claimants to interplead; but if it appeared that a third party claimed a portion of the award, the court would, in our opinion, have the power to require such person to be brought in as a party to the action, in order that there might be a full and final adjudication of the rights of all parties in the fund; and, if such a person can be thus brought in, there is no reason why he may not be allowed to come in voluntarily. The court, in such case, is not called on to assess the property, but merely to apportion and divide what has been assessed among the different parties according to their respective interests in the property. Awards are often made in gross, and the division made afterwards, according to ownerships.

* * * * * * * * * * *

Order affirmed.

(c) Interpleader.

HARTFORD LIFE AND ANNUITY INSURANCE COMPANY v. CUMMINGS.

Supreme Court of Nebraska. 1897.

50 Nebraska, 236.

RAGAN, C.: July 24, 1895, Martin M. Marshall died. His life was insured for $5,000 in the Hartford Life & Annuity Insurance Company, hereinafter called the "Insurance Company." His wife, Mary, was the beneficiary named in the insurance policy. At the date of her husband's death Mrs. Marshall was indebted to the Omaha National Bank, hereinafter called the "Bank." August 5, 1895, the bank brought suit in the state of Connecticut,

in the county of the domicile of the insurance company, against Mrs. Marshall, and caused the insurance company to be attached as garnishee. The insurance company was duly served with process in the attachment and garnishee proceedings, but made no appearance therein. A duly-attested copy of the summons and complaint in the proceedings of the bank against Mrs. Marshall was, on August 6, 1895, served on her, by leaving the same with the secretary of the insurance company. Mrs. Marshall was not otherwise served with process in the action, and made no appearance therein. March 18, 1896, the court in Connecticut rendered judgment that the bank recover of Mrs. Marshall, out of the attached money in the hands of the insurance company, the sum of $——. An execution was issued on this judgment, and returned March 31, 1896, wholly unsatisfied. Thereupon the bank, in pursuance of the provisions of the statute of Connecticut, instituted a *scire facias* proceeding against the insurance company, and prayed for a judgment against it for the amount of the bank's claim against Mrs. Marshall to the extent of the money owing by the insurance company on the insurance policy. Prior to the bank's judgment in attachment against Mrs. Marshall, to wit, November 18, 1895, James P. Cummings brought this suit to the district court of Douglas county against the insurance company on the policy issued on the life of Martin M. Marshall, claiming to be the owner of said policy, and entitled to collect the $5,000 due thereon, by virtue of an oral assignment thereof to him August 5, 1895, made by Mrs. Marshall. The insurance company was duly summoned in this action, and, November 19, 1895, before answering, its attorney filed in the case an affidavit reciting that he was the duly-authorized attorney of the insurance company; that the insurance company was a corporation; that the claim of Cummings was based upon a contract for the recovery of personal property; that the bank was a corporation organized under the laws of the state of Nebraska, having its principal place of business in said Douglas county; that the bank, without collusion with the insurance company, made a claim to the subject-matter of the action; that the insurance company was ready to pay the amount claimed upon order of the court,—and thereupon moved the court for an order on the bank to interplead in the action. On

the same day the district court made an order that the bank appear on the 30th of December, 1895, and file its answer maintaining its claim to the said sum, the $5,000 claimed by Cummings from the insurance company, and, in default thereof, that it relinquish its claim against the insurance company for said sum of money. On the 27th day of November, 1895, the bank appeared in the action, and moved the court to require Cummings to give security for costs, and on the same date moved the court for an order requiring Cummings to make his petition more definite and certain. April 27, 1896, the bank asked and obtained leave to plead in 20 days. On May 13, 1896, the bank moved the court for an order to suspend further proceedings in the case until the *scire facias* proceeding instituted by it in Connecticut against the insurance company should be finally determined. June 13, 1896, the insurance company moved the court for an order overruling this last motion made by the bank, and for an order—upon its paying the $5,000 in controversy into court—enjoining the bank from further prosecuting its *scire facias* proceeding pending in Connecticut, and a further order that it (the insurance company) might thereupon be discharged from any further liability as to said fund both to the bank and Cummings. At this time the bank amended its motion to suspend proceedings in the case at bar into a motion to vacate the order made by the court requiring the bank to appear and interplead. The court overruled the motion of the insurance company, and sustained the amended motion of the bank, and entered a judgment dismissing the bank from the case. At the time Cummings brought this suit, and at the time the bank appeared in the case in obedience to an order of the court for it to interplead, the court in Connecticut had obtained no jurisdiction over him, if it can be said that it has since obtained such jurisdiction. To reverse the judgment of the district court dismissing the bank from the action, the insurance company prosecutes a petition in error here.

It will thus be seen that the insurance company has in its hands $5,000, money owing by it on the policy issued to Martin M. Marshall. The bank claims this money by virtue of its judgment proceedings against Mrs. Marshall in the court of Connecticut, while Cummings claims it by virtue of an assignment of the policy to him by Mrs. Mar-

shall, the beneficiary thereof. Section 48 of the code of civil procedure is as follows: "Upon the affidavit of a defendant, before answer, in an action upon contract, or for the recovery of personal property, that some third party, without collusion with him, has or makes a claim to the subject of the action, and that he is ready to pay or dispose of the same, as the court may direct, the court may make an order for the safe-keeping, or for the payment, or deposit in court, or delivery of the subject of the action, to such person as it may direct, and an order requiring such third party to appear in a reasonable time and maintain or relinquish his claim against the defendant. If such third party, being served with a copy of the order by the sheriff, or such other person as the court may direct, fail to appear, the court may declare him barred of all claim in respect to the subject of the action, against the defendant therein. If such third party appear, he shall be allowed to make himself defendant in the action, in lieu of the original defendant, who shall be discharged from all liability to either of the other parties in respect to the subject of the action, upon his compliance with the order of the court for the payment, deposit or delivery thereof."[1] This statute is a substitute for the chancery rule or remedy of interpleader. The rule was applied on the theory that at law no adequate protection was afforded a defendant sued for a fund or property in his possession and claimed by some person not a party to the suit. But the statute just quoted is broader than the chancery rule. Under the statute a defendant sued for a fund or property in his hands is entitled to an order compelling a third party claiming such fund or property to interplead in the action, even though the defendant might successfully de-

[1] This is the common interpleader statute found substantially in most of the codes, though with some differences in wording. See *Alaska*, Carter's Ann. Codes, 1900, Code Civ. Pro., § 37; *Arkansas*, Kirby's Digest, 1904, § 6013; *California*, Kerr's Codes, 1908, Code Civ. Pro., § 386; *Colorado*, Rev. Stat., 1908, Code Civ. Pro., § 18; *Idaho*, Rev. Codes, 1908, § 4109; *Indiana*, Burns' Ann. Stat., 1908, § 274; *Iowa*, Code, 1897, § 3487; *Kansas*, Gen. Stat., 1909, § 5635; *Kentucky*, Carroll's Codes, 1895, §30; *Minnesota*, Laws, 1905, § 4138; *Montana*, Rev. Codes, 1907, § 6495; *Nebraska*, Comp. Stat., 1911, § 6615; *Nevada*, Comp. Laws, 1900, § 3693; *North Carolina*, Revisal of 1905, § 414; *North Dakota*, Rev. Codes, 1905, § 6826; *Ohio*, Gen. Code, 1910, § 11265; *Oklahoma*, Comp. Laws, 1909, § 5575; *Oregon*, Lord's Laws, 1910, Code Civ. Pro., § 40; *South Carolina*, Code of Laws, 1902, Code Civ. Pro., § 143; *South Dakota*, Rev. Codes, 1903, Code Civ. Pro., § 97; *Utah*, Comp. Laws, 1907, § 2921; *Washington*, Rem. & Bal. Codes, 1910, § 198; *Wisconsin*, Stat., 1898, § 2610; *Wyoming*, Comp. Stat., 1910, § 4334.

fend the suit; the theory of the statute being to avoid multiplicity of suits, and to protect the party holding the fund or property from being put to the costs and expense of defending against claimants for property in his hands which he himself does not claim. Under the chancery rule, a party in the possession of a fund or property claimed by tow or more parties, before being sued by either of them, might, by bill filed for that purpose, compel the claimants to come in and set up their claims to the fund or property, and, on paying the money or delivering the property into the custody of the court, be discharged from any further liability to all of said parties for such property or fund. In other words, the fact that the holder of the fund or property was aware of conflicting claims of other parties thereto, and was in danger of being sued by said parties, enabled such holder to successfully invoke the protection of a court of chancery. *Newhall v. Kastens,* 70 Ill. 156; *Richards v. Salter,* 6 Johns. Ch. 445. In *McWhirter v. Halsted,* 24 Fed. 828, the court, speaking of the chancery practice as to interpleaders, said: "The best elementary writers say that an interpleader is properly applied where two or more persons severally claim the same thing under different titles or in separate interests from another person, who, not claiming any title or interest therein himself, and not knowing to which of the claimants he ought of right to render the debt, is either molested by an action brought against him, or fears that he may suffer injury from the conflicting claims of the parties."

In the case at bar the insurance company has been sued by Cummings for the fund in its hands in the courts of this state. The bank is also claiming the fund in the hands of the insurance company in a suit pending in the courts of the state of Connecticut, to which suit Cummings is not a party, and over whom the Connecticut court has no jurisdiction. In this suit the district court of Douglas county has jurisdiction of all the parties who claim this fund, as well as of the holder thereof. If the statute quoted above was not in force, these facts would authorize the order made by the district court for the bank to interplead in this action, and set up its claim to the fund in the hands of the insurance company. But this is not all. It appears that the assignment made of the insurance policy by Mrs. Marshall to Cummings was an oral assign-

ment, and that no notice of such an assignment was given to the insurance company prior to the time the bank attached the debt owing by the insurance company on the policy. Under such a state of facts, the holding of the Connecticut courts is that the attaching creditor acquires a lien upon the fund superior to the lien of the assignee (*Bishop v. Holcomb,* 10 Conn. 444; *Vanbuskirk v. Insurance Co.,* 14 Conn. 141;) while the rule in this state is that a creditor who attaches a chose in action acquires only a lien upon the interest which the defendant in the attachment suit had therein at the time the chose in action was seized (*Coleman v. Scott,* 27 Neb. 77, 42 N. W. 896.)

It will thus be seen that not only are there rival claimants of the fund in the hands of the insurance company, and that it has been sued by two different parties in different jurisdictions for the fund, but that, if the bank is allowed to prosecute its *scire facias* proceeding in the courts of Connecticut, and not be compelled to interplead in this action, the insurance company is liable to have to pay the debt it owes twice. The insurance company has brought itself within the provisions of section 48 of the Code, quoted above, and we think the facts of the case justified the order made by the district court requiring the bank to interplead in this action; and, without quoting the evidence introduced on the hearing of the motion to dismiss the bank from the case, we think the district court erred in making that order. The insurance company was entitled to an order permitting it to pay the fund in its hands into the custody of the court, and, upon so doing, to be dismissed from the case, and to be discharged of all further liability for that fund both to Cummings and the bank; or, if it saw fit to remain in the case, and defend the action of Cummings, it was entitled to an order enjoining the bank from further prosecution its *scire facias* proceeding, pending in the courts of Connecticut, until the final determination of the action at bar. The judgment of the district court is reversed, at the cost of the bank, and the cause remanded for further proceeding in accordance with this opinion.

Reversed and remanded.

FIRST NATIONAL BANK OF CADIZ v. BEEBE.

Supreme Court of Ohio. 1900.

62 Ohio State, 41.

The plaintiff in error, the First National Bank of Cadiz, Ohio, having, on September 22, 1896, obtained a judgment against one Stuart J. Beebe for $6,342.33, on which execution had issued and been returned "No property of any kind whereon to levy," filed a petition in the court of common pleas of Harrison county, under favor of section 5464 of the Revised Statutes, against Stuart J. Beebe, the judgment debtor, and I. C. Moore, as administrator de bonis non with will annexed of Walter B. Beebe, deceased (father of Stuart J. Beebe,) alleging that the latter was both a legatee and creditor of the estate, and asking that the administrator pay into court, out of the claims thus belonging to Stuart J. Beebe, an amount sufficient to satisfy the judgment aforesaid.

The defendant I. C. Moore, as administrator, instead of filing a formal answer, filed an affidavit for interpleader, setting forth that the defendant in error herein, Angie Beebe (wife of Stuart J. Beebe), claimed to be the owner of both his legacy under the will and also the indebtedness, amounting to about $10,000, due him from the estate, and asking that she be required to interplead, and for such other orders as would protect him in paying out the money.

An order to that effect was made by the court, and a copy thereof served in due form upon her. Instead of becoming a party, and setting up her claim, she filed a motion to quash the service of summons (notice) on her for want of jurisdiction. This motion was overruled, and, her counsel electing not to answer, a decree was entered requiring the administrator to pay sufficient of the indebtedness of Stuart J. Beebe against the estate into court to satisfy the judgment claim of the plaintiff against him. Exception was taken to the overruling of the motion to quash, and the case was taken to the Circuit Court on this one question. The Circuit Court reversed the common pleas, and the case is now brought here for review. Other

parties and questions were involved in the case, but the above facts are all that concern the present hearing.

Reversed.

SPEAR, J.: * * * 1 Was the case a proper one for interpleader? It is insisted that section 5016, Rev. St., regulates the whole subject of interpleader, and that, inasmuch as that section limits such right to actions upon contract, or for the recovery of personal property, and as the case made in the petition and affidavit for interpleader does not bring it within the provisions of that section, the court was without jurisdiction to entertain the action. And it was wanting in jurisdiction for the further reason that Walter B. Beebe was a resident of the county of Franklin at the time of his decease, and the estate was in process of settlement in the probate court of that county at the time the action was commenced in Harrison county.

The record does not show in what probate court the estate of Walter B. Beebe, deceased, was being settled, but it is, probably, not of consequence. It is true that the section referred to gives authority to a defendant, before answer, in an action upon contract, or for the recovery of personal property, to file affidavit, and ask that contesting claimants interplead, and provides for the payment into court for safekeeping of the subject of the action; and it would be safe to concede that the case does not fall within either class named. But does it follow that the statute was intended to regulate the whole subject-matter of interpleader, and take away the equitable remedy theretofore existing and enforced by the well-established practice of courts of chancery? It is to be noted that no such purpose is expressed. The section was section 42 of the code of civil procedure, and stands to-day as enacted in 1853. Section 603 of the same act has this provision: "If a case ever arise, in which an action for the enforcement and protection of a right, or the redress or prevention of a wrong, cannot be had under this code, the practice heretofore in use may be adopted, so far as may be necessary to prevent a failure of justice." This language would seem to be broad enough to cover the case in hand. But, aside from this, the matter of interpleader is of equitable cognizance. It may be resorted to "where two or more persons severally claim the same thing under different titles or in separate interests from another person, who, not claiming any title or in-

terest therein himself, and not knowing to which of the claimants he ought to render the debt or duty claimed or deliver the property, is either molested by an action or actions brought against him, or fears that he may suffer injury from the conflicting claims of the parties." 2 Story, Eq. Jur. § 806. The cause below seems to be described by this language. And that the equitable action of interpleader still survives we think has been the common understanding of the bench and bar since the enactment of the code. In *First Presbyterian Soc. v. First Presbyterian Soc.*, 25 Ohio St. 128, it is held that: "Where a trust is created for the benefit of an incorporated religious society, and there are two bodies which claim to be such society, a court of equity may require the claimants to interplead, and may proceed to ascertain the true beneficiary, without compelling either party to establish its corporate rights at law." Such, too, seems to be the understanding of the text writers and of the courts of sister states. 3. Pom. Eq. Jur. § 1329; 2 Story, Eq. Jur. § 823; Beach, Mod. Eq. Prac. § 173; 1 Foster, Fed. Prac. § 88; *Barry v. Insurance Co.*, 53 N. Y. 536; *Board v. Scoville*, 13 Kan. 17.

Much more might be added of like import, but it seems to us unnecessary. We are of opinion that the statute (Section 5016) was intended as auxilliary to the chancery practice as theretofore understood, and as directing the practice in the particular classes of cases named, and was not intended to regulate the whole subject-matter of interpleader, and that the case made by the petition and affidavit was a proper one for interpleader.

* * * * * * * * * * *

Reversed.

CHAPTER II.

SPLITTING A CAUSE OF ACTION.

SECOR v. STURGIS.

Court of Appeals of New York. 1858.

16 New York, 548.

Appeal from the Supreme Court. Action upon a bond executed under section thirteen of title eight, chapter eight, part three of the Revised Statutes (2 R. S., 495), to procure the discharge of a vessel from an attachment issued upon application of the plaintiffs.

* * * * * * * * * * *

* * * The cause was tried before a referee, who found as matter of fact that the plaintiffs, as co-partners under the name and firm of Charles A. Secor & Co., carried on the business of ship-carpenters and the business of ship-chandlers, and for their business occupied the store and premises known as No. 68 West street, in New York; that their offices for transacting the business of ship-carpenters was on the second floor of said store, and that business was conducted and carried on under the particular direction and management of Zeno Secor and Henry R. Secor, two of the plaintiffs, who personally took no part in the business of ship-chandlers carried on by the firm; that their store and office for transacting the business of ship-chandlers was on the first floor of said store, No. 68 West street, and that business was conducted under the particular direction and management of Charles A. Secor, the other plaintiff, who personally took no part in the business of ship-carpenters carried on by the firm; that separate books of account, of and relating to their business of ship-carpenters, were kept in said office of the firm for the transaction of that business, which books were kept and the entries therein made by the plaintiffs Zeno Secor and Henry R. Secor themselves; that separate books of account, of and relating to their business of ship-chandlers, were kept in said store

and office of the firm for the transaction of that business, which books were kept and the entries therein made by John G. Merrill, the bookkeeper, and Henry P. Gardner, a clerk of the firm in their business of ship-chandlers; that the bills for work done and materials furnished by the plaintiffs as ship-carpenters were made out by said plaintiffs Zeno Secor and Henry R. Secor, or one of them, but were sometimes copied and rendered by said Merrill or said Gardner, and the bills for goods sold by the plaintiffs as ship-chandlers were made out and rendered by said Merrill or said Gardner, and ordinarily the bills of said plaintiffs as ship-carpenters were rendered separately from their bills as ship-chandlers; that on or immediately before the 23d day of November, 1849, the plaintiffs, upon the application and order of Captain Locke, then master of the brig Leverett, lying in the port of New York, did and performed carpenter's work to, on and about said brig, and furnished materials therefor, to the amount of $139.32; that from the 22d day of November to the 18th day of December, 1849, inclusive, the plaintiffs, upon the application and order of Captain Locke, sold, at their ship-chandlery store, No. 68 West street, and delivered on board of said brig, for her use, goods and articles of ship-chandlery to the amount of $521.15; that the order for said goods and articles was given, at the said store of the plaintiffs, to their clerk, Henry P. Gardner, and the goods and articles were so sold and delivered by their said clerk; that in the month of November, 1849, before giving the order for ship-chandlery, Captain Locke told the clerk, Gardner, that he had made an engagement with the plaintiffs for some ship-carpenter's work to be done by them on said brig; that separate bills, one for said ship-carpenter's work and materials, amounting to $139.32, and one for said goods and articles of ship-chandlery, amounting to $521.15, were, on or about the 19th day of December, 1849, made out and rendered by the plaintiffs, which bills were together delivered, by the clerk of the plaintiffs, Gardner, to Captain Locke, on board the brig; that on the 20th day of December, 1849, the plaintiffs applied to and obtained from a justice of the Supreme Court a warrant to enforce the lien of their debt for ship-chandlery on and against said brig, and to collect the amount thereof, under and by virtue of which warrant the sheriff of New York attached and took posses-

sion of the brig; that, to procure the discharge of the brig from the attachment, the defendants gave the bond which is the subject of this action, and thereupon the order was granted discharging said warrant; that, after the issuing of said warrant and before said bond was executed, Locke, at the store of the plaintiffs, promised to pay the bill for ship-carpentering; that on the 29th day of December, 1849, the plaintiffs presented to and filed in the District Court of the United States for the southern district of New York their libel against said brig for the collection of their said bill for work done and materials found by them as ship-carpenters, amounting to $139.32, upon which process was issued and the brig seized; that upon the 15th day of February, 1850, on a consent given by Locke, the claimant of said brig, judgment was rendered, in the District Court, in the cause commenced by said libel, in favor of the plaintiffs, for $140.69, with their costs, and that on the 26th day of March, 1850, upon a certificate of the clerk of said District Court that the amount of the judgment had been paid, an order was duly made and entered, by which such judgment was satisfied and discharged. Upon the facts found, the referee decided, as matter of law, that there was due to the plaintiffs in this action, on the said 20th day of December, 1849, the sum of $521.15 upon this claim and demand for goods and articles of ship-chandlery sold and delivered as aforesaid; which, by the provisions of title eight, chapter eight, part three of the Revised Statutes, was a subsisting lien upon said brig at the time of the exhibition of said claim or demand and of the application for the attachment, and that the defendants are indebted and liable to pay to the plaintiffs, the said sum of $521.15 with interest. In the progress of the trial exceptions were taken to several decisions on questions of evidence; and, after the evidence was closed, the defendant moved for a nonsuit, on the ground that the proofs showed the plaintiffs recovered a judgment in the District Court, upon a demand of which that in suit is a part, and that such judgment is a bar to this action, which motion was denied and the defendants excepted to the decision. The defendants also excepted to the conclusions of law in the report of the referee, as to their indebtedness and liability to the plaintiffs and the right of the plaintiffs to judgment against them. The judgment entered upon the report for the plain-

tiff was, on appeal, affirmed by the Supreme Court at general term in the first district, and the defendants appealed to this court.

STRONG, J.: It is not controverted that the account, the amount of which is sought to be recovered in this action, was due to the plaintiffs, and a lien on the vessel, at the time of the application for the attachment, and also at the time of the execution of the bond on which this action is founded; but it is insisted that the said account, and the account for which judgment was recovered in the District Court of the United States, together, constituted a single cause of action, and that the judgment for part of it is a bar to a recovery in this action for the residue. The answer does not, in express terms, allege that the cause of action in the suit in the District Court was the same as that in the present suit, but it was treated in the reply as containing substantially that allegation, and must therefore be so regarded by the court. It was essential, in order to present the question raised, that the identity of the cause of action in the different suits should, in some form, be averred in the answer. (3 Chit. Pl. 928, 9; *Philips v. Berick,* 16 John. 137, 140.)

The principle is settled beyond dispute that a judgment concludes the rights of the parties in respect to the cause of action stated in the pleadings on which it is rendered, whether the suit embraces the whole or only part of the demand constituting the cause of action. It results from this principle, and the rule is fully established, that an entire claim, arising either upon a contract or from a wrong, cannot be divided and made the subject of several suits; and if several suits be brought for different parts of such a claim, the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in the other suits. (*Farrington v. Payne,* 15 John. 432; *Smith v. Jones,* id. 229; *Philips v. Berick,* 16 id. 137; *Miller v. Covert,* 1 Wend. 487; *Guernsey v. Carver,* 8 id. 492; *Stevens v. Lockwood,* 13 id. 644; *Colvin v. Corwin,* 15 id. 557; *Bendernagle v. Cocks,* 19 id. 207, and cases there cited.) But it is entire claims only which cannot be divided within this rule, those which are single and indivisible in their nature. The cause of action in the different suits must be the same. The rule does not prevent, nor is there any principle which pre-

cludes, the prosecution of several actions upon several causes of action. The holder of several promissory notes may maintain an action on each; a party upon whose person or property successive distinct trespasses have been committed may bring a separate suit for every trespass; and all demands, of whatever nature, arising out of separate and distinct transactions, may be sued upon separately. It makes no difference that the causes of action might be united in a single suit; the right of the party in whose favor they exist to separate suits is not affected by that circumstance, except that in proper cases, for the prevention of vexation and oppression, the court will enforce a consolidation of the actions.

It is not, as will be seen by the cases, always easy to determine whether separate items of claim constitute a single or separate cause of action; and this difficulty, connected with neglect, in some instances, of proper attention to the principle of the rule under consideration, has led to some loose expressions and confusion in the books on this subject. *Farrington v. Payne,* was a plain case of an individual cause of action. A bed and bed quilts were taken at the same time and by the same act, and a recovery in trover for the quilts was held to be a bar to a recovery in trover for the bed. In *Smith v. Jones,* actions were brought for goods sold and delivered, the plaintiff, in one, claiming to recover for one barrel of potatoes, and in the other for two barrels of the same article, all sold at the same time. The court held that the demand could not be divided into separate suits. This was also a plain case of one cause of action. *Miller v. Covert,* in which the same rule was applied, was a case of a sale of hay, under a contract, delivered in parcels. The demand was held to be entire and indivisible.

In *Guernsey v. Carver,* the plaintiff declared on a book account consisting of items of merchandise delivered between the 20th of July and the 27th of August, 1828, amounting to $2.35. The defendant pleaded a former suit for the same identical cause and causes of action. It was proved in the common pleas that the plaintiff had an account against the defendant, consisting of twenty different articles of merchandise, delivered on fourteen different days between the 4th of June and the 27th of August, 1828, amounting to between $5 and $6; that he commenced

a suit against the defendant, and exhibited an account of items delivered between the 1st of June and the 19th of July, 1828, amounting to $2.74; that the defendant pleaded a tender in such suit, and obtained judgment for costs. The plaintiff then sued for the balance of such account, viz., for items delivered between the twentieth of July and the twenty-seventh of August. The common pleas decided that on a running account, where no special contract was made at the commencement of the account, and where items have been delivered on such account at different times, without any intermediate agreement, each separate delivery formed a separate and distinct cause of action, and that separate suits might be maintained on each separate delivery; and the plaintiff recovered judgment. On appeal to the Supreme Court the judgment was reversed. The court, by NELSON, J., after stating that it was settled in that court that if a plaintiff bring an action for part only of an entire and indivisible demand, the judgment in that action is a conclusive bar to a subsequent suit for another part of the same demand, says: "This case comes within the reason and spirit of that principle. The whole account being due when the first suit was brought, it should be viewed in the light of an entire demand, incapable of division, for the purpose of prosecution. The law abhors a multiplicity of suits. According to the doctrine of the court below, a suit might be sustained, after the whole became due, on each separate item delivered, and if any division of the account is allowable it must no doubt be carried to that extent. Such a doctrine would encourage intolerable oppression upon debtors, and be a just reproach upon the law. The only just and safe rule is to compel the plaintiff, on an account like the present, to include the whole of it due in a single suit." The reasoning of the learned justice would make every account consisting of different items, the whole of which is due, an entire demand incapable of division for the purpose of prosecution irrespective of every other consideration. It excludes the idea that it is necessary the claims should have arisen out of a single transaction, or be connected together by contract. This, in my opinion, is carrying the doctrine in question far beyond its just limits. *Stevens v. Lockwood* was a case similar to the last, and decided upon similar views. These

cases may have been rightly decided, but I cannot assent to all the reasons given for the decisions.

In *Colvin v. Corwin,* two suits were brought for lottery tickets sold the defendant. On the trial of the first the defendant admitted he had bought the tickets alleged to have been sold to him, and judgment was rendered for the plaintiff. The judgment was set up as a bar in the second suit, and on the trial it appeared that the tickets claimed in the suits were delivered to the defendant by two different agents of the plaintiff, at different offices occupied by them, at different times, and it was held by the Supreme Court that the previous judgment was a bar to a recovery. It is manifest that this decision rests on no sound principle, and is not law. A plainer case of distinct independent causes of action could hardly be presented.

Bendernagle v. Cocks was an action for breaches of certain covenants contained in an indenture of lease. A plea in abatement was interposed of an action pending upon the same lease for the alleged breach by the defendant of covenants therein. It is stated in the reporter's note that all the causes of action had accrued at the time of the bringing of the first action. The plaintiff replied that the covenants, for the breach of which the first suit was brought, were other, distinct and different from the covenants for breach of which the second suit was brought. The defendant demurred, and the common pleas overruled the demurrer, but the Supreme Court reversed the judgment. COWEN, J., who delivered the opinion of the court, reviews and comments upon many of the cases, after which he makes the following observations: "I admit that the rule does not extend to several and distinct trespasses or other wrongs, nor, as we have seen, to distinct contracts. It goes against several actions for the same wrong, and against several actions on the same contract. All damages accruing from a single wrong, though at different times, make but one cause of action, and all debts or demands already due by the same contract make one entire cause of action. Each comes under the familiar rule that if a party will sue and recover for a portion, he shall be barred of the residue. Proof of that fact would sustain the common issue presented in *Bagot v. Williams,* that the plaintiff had before impleaded the defendant, and recovered for the same identical cause of action," etc.

The true distinction between demands or rights of action which are single and entire, and those which are several and distinct is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts. Perhaps as simple and safe a test as the subject admits of, by which to determine whether a case belongs to one class or the other, is by inquiring whether it rests upon one or several acts or agreements. In the case of torts, each trespass, or conversion, or fraud, gives a right of action, and but a single one, however numerous the items or wrong or damage may be; in respect to contracts, express or implied, each contract affords one and only one cause of action. The case of a contract containing several stipulations to be performed at different times is no exception; although an action may be maintained upon each stipulation as it is broken, before the time for the performance of the others; the ground of action is the stipulation which is in the nature of a several contract. Where there is an account for goods sold, or labor performed, where money has been lent to or paid for the use of a party at different times, or several items of claim spring in any way from contract, whether one only or separate rights of action exist, will, in each case, depend upon whether the case is covered by one or by separate contracts. The several items may have their origin in one contract, as on an agreement to sell and deliver goods, or perform work, or advance money; and usually, in the case of a running account, it may be fairly implied that it is in pursuance of an agreement that an account may be opened and continued, either for a definite period or at the pleasure of one or both of the parties. But there must be either an express contract, or the circumstances must be such as to raise an implied contract, embracing all the items, to make them, where they arise at different times, a single or entire demand or cause of action.

Applying this test to the present case, it is very clear that the two accounts did not constitute an entire claim; but, on the contrary, that they were several and formed two several causes of action. The business of the plaintiffs consisted of two branches, which were designed to be and were kept entirely distinct, in each of which one of the accounts was made, and an arrangement was entered into under which one of the accounts arose anterior to the open-

ing of the other account. Here was no express contract connecting the two accounts; and the facts, instead of warranting the presumption of such a contract, show that separate agreements only, one in regard to each account, were intended.

* * * * * * * * * * *

No error was committed in the rulings upon the questions of evidence at the trial.

The judgment must be affirmed.

All the judges concurring.

Judgment affirmed.[1]

[1] *Several breaches* of a single entire contract do not create several causes of action. "As the contract is single and entire, so the cause of action for its breach is single and entire, even though there be different acts, each of which constitutes a breach of the contract. The breach of the contract may be more aggravated, but it cannot be more ample, by many acts in violation thereof, than by one act." Cockley v. Brucker (1896), 54 Ohio St. 214, 226.

REILLY v. SICILIAN ASPHALT PAVING COMPANY.

Court of Appeals of New York. 1902.

170 New York, 40.

CULLEN, J.: The appellant claimed that while driving in Central Park, in the city of New York, both his person and his vehicle were injured in consequence of collision with a gravel heap placed on the road through the negligence of the defendant. Thereupon he brought an action against the defendant in the court of common pleas to recover damages for the injury to his person. Subsequently he brought another action in one of the district courts in the city of New York to recover for the injury to his vehicle. In his last action he obtained judgment, which was paid by the defendant. Thereafter the defendant set up by supplemental answer the judgment in the district court suit and its satisfaction as a bar to the further maintenance of the action in the common pleas. On the trial of the case in the Supreme Court, to which, under the constitution, the action was transferred, it was held that the plaintiff's right

of action was merged in the judgment recovered in the district court, and his complaint was dismissed. The judgment entered upon this direction was affirmed by the appellate division, and an appeal has been taken to this court by allowance.

The rule is that a single or entire cause of action cannot be subdivided into several claims, and separate actions maintained thereon. *Secor v. Sturgis,* 16 N. Y. 548; *Nathans v. Hope,* 77 N. Y. 420. As to this principle there is no dispute. Therefore the question presented by this appeal is whether, from the defendant's negligence, and the injury occasioned thereby to the plaintiff in his person and his property, there arose a single cause of action, or two causes of action,—one for the injury to his person, and the other for injury to his property. The question is not determined by the code of civil procedure, for, though in section 484 it prescribes what separate causes of action may be joined in the same complaint, it nowhere assumes to define what is a single cause of action. Nor is there any controlling decision of this court on the point. In *Mulligan v. Ice Co.* (affirmed without opinion), 109 N. Y. 657, the question discussed in the opinion of the learned court below, and necessarily involved in the decision of this court, was the effect of a release which the plaintiff asserted was intended to cover only the injuries to his property, but was fraudulently prepared so as to embrace his whole cause of action. The case is doubtless authority for the proposition that a voluntary settlement between the parties of part of a claim does not satisfy or discharge the whole claim. But the principle that the parties may, by voluntary agreement, sever or split up a single cause of action, though a plaintiff cannot of his own volition do the same, seems to be generally recognized even in those jurisdictions where the rule is held most firmly that a single tort gives rise but to a single cause of action. *O'Beirne v. Lloyd,* 43 N. Y. 248; *Bliss v. Railroad Co.,* 160 Mass. 447.

The question now before us has been the subject of conflicting decisions in different jurisdictions. In England it has been held by the Court of Appeal (Lord COLERIDGE, C. J., dissenting) that damages to the person and to property, though occasioned by the same wrongful act give rise to different causes of action (*Brunsden v. Humphrey,* 14 Q. B. Div. 141), while in Massachusetts, Minnesota, and Missouri

the contrary doctrine has been declared (*Doran v. Cohen,* 147 Mass. 342; *King v. Railroad Co.* [Minn.], 82 N. W. 1113, 50 L. R. A. 161, 81 Am. St. Rep. 238; *Von Fragstein v. Windler,* 2 Mo. App. 598). The argument of those courts which maintain that an injury to person and property creates but a single cause of action is that, as the defendant's wrongful act was single, the cause of action must be single, and that the different injuries occasioned by it are merely items of damage proceeding from the same wrong, while that of the English court is that the negligent act of the defendant in itself constitutes no cause of action, and becomes an actionable wrong only out of the damage which it causes. "One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person." *Brunsden v. Humphrey, supra.* I doubt whether either argument is conclusive. If, where one person was driving the vehicle of another, both the driver and the vehicle were injured, there can be no doubt that two causes of action would arise—one in favor of the person injured, and the other in favor of the owner of the injured property. On the other hand, if both the horse and the vehicle, being the property of the same person, were injured, there would be but a single cause of action for the damage to both. If, while injury to the horse and vehicle of a person gives rise to but a single cause of action, injury to the vehicle and its owner gives rise to two causes of action, it must be because there is an essential difference between an injury to the person and an injury to property, that makes it impracticable, or at least very inconvenient, in the administration of justice, to blend the two. We think there is such a distinction. Different periods of limitation apply. The plaintiff's action for personal injuries is barred by the lapse of three years; that to the property not till the lapse of six years. The plaintiff cannot assign his right of action for the injury to his person, and it would abate and be lost by his death before a recovery of a verdict, and, if the defendant were a natural person, also by his death before that time. On the other hand, the right of action for injury to property is assignable, and would survive the death of either party. It may be seized by creditors on a bill in equity (*Hudson v. Plets,* 11 Paige, 180), and would pass to an assignee in bankruptcy. Possibly the difficulties

arising from the difference in the periods of limitation and the difference in the rule of survival between a personal injury and a property injury might be obviated in practice by holding the statute a bar to that portion of the damages, a claim for which would have been outlawed had it been a separate cause of action, and by permitting, in case of death, the action to be revived so far as it relates to property. We do not see, however, how it would be practicable to deal with a case where the right of action for injury to the property had passed to an assignee in bankruptcy, or to a receiver on a creditor's bill, without treating it as an independent cause of action. Though, as we have already said, section 484 of the code does not expressly determine the point in issue, still it is not without much force in the argument that the two injuries constitute separate causes of action. Under the old code of procedure, at the time of its original enactment injuries to person and injuries to property were separately classified as causes of action, and it was not permitted to join those of one class with those of another. Code Proc. § 167. By an amendment in 1852, injuries to persons and property were put in the same class. But by section 484 of the code of civil procedure they are again placed in distinct classes, and cannot be united. If the plaintiff's cause of action is single, into what class does it fall? Is it for an injury to the person, which may be united with other causes of action for personal injuries, or is it for injury to property, which may be joined with claims of the same nature, or is it *sui generis*, a nondescript which must stand alone?

While some of the difficulties in the joinder of a claim for injury to the person and one for injury to the property in one cause of action are created by our statutory enactments, the history of the common law shows that the distinction between torts to the person and torts to property has always obtained. Lord Justice BOWEN, in the *Brunsden Case*, has pointed out that there is no authority in the books for the proposition that a recovery for trespass to the person is a bar to an action for trespass to goods, or *vice versa*. It is true that at common law the necessity of bringing two suits could, at the election of the plaintiff, be obviated in some cases, as, for instance, by declaring for trespass on the plaintiff's close, and alleging in aggravation thereof

an assault upon his person. See Wat. Tresp. 205, 406. Still in such a case there would be but a single cause of action, to wit, the trespass upon the close, and, if the defendant justified this trespass, it would be a complete defense to the action; the personal assault being merely a matter of aggravation. *Carpenter v. Barber*, 44 Vt. 441.

Therefore, for reason of the great difference between the rules of law applicable to injuries of the person and those relating to injuries to property, we conclude that an injury to person and one to property, though resulting from the same tortious act, constitute different causes of action.

The judgment appealed from should be reversed, and a new trial granted; costs to abide the event.

PARKER, C. J., and GRAY, O'BRIEN, MARTIN, VANN, and WERNER, JJ., concur.

Judgment reversed, etc.[1]

[1] A different conception of the term "cause of action," led the Supreme Court of Minnesota to a directly contrary holding in King v. Chicago, Milwaukee & St. Paul Ry. Co. (1900), 80 Minn. 83. In this case plaintiff was run into and injured both in person and property on a railroad crossing by the same wrongful act, and he first sued for and recovered damages for injury to his person. Thereafter he commenced another suit for injuries to his horses, wagon and harness. After considering the English case of Brunsden v. Humphrey, 14 Q. B. Div. 141, discussed in the Reilly case, *supra* in the text, and other authorities, the court said: "We are of opinion that the cause of action consists of the negligent act which produced the effect, rather than the effect of the act in its application to different primary rights, and that the injury to the person and property as a result of the original cause gives rise to different items of damage. * * * That rule of construction should be adopted which will most speedily and economically bring litigation to an end, if at the same time it conserves the ends of justice. There is nothing to be gained in splitting up the rights of an injured party as in this case, and much may be saved if one action is made to cover the subject."

PAYNE v. NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY.

Court of Appeals of New York. 1911.

201 New York, 436.

WERNER, J.: The learned appellate division of the second department has certified to us the following questions: (1) "In an action for damages for personal injuries by a serv-

ant against a master, is it proper for the plaintiff to plead in his complaint as one cause of action facts constituting negligence under the common law, facts constituting negligence under the employer's liability act of the state of New Jersey, and facts constituting negligence under the act of Congress known as the federal employer's liability act, or any two of said grounds of liability?" (2) "Should a plaintiff be compelled to separate the facts constituting liability under the aforesaid acts, and plead them as separate causes of action?" (3) "Under the complaint in this case was it proper to direct the plaintiff, in case he desired to rely upon any except the common-law liability of defendant, to separately state the facts constituting the statutory liability and plead them as separate causes of action?"

The complaint upon which these questions arise is simple and precise. It alleges that the defendant is a railroad corporation, operating a line of railroad within certain parts of this state and within parts of the state of New Jersey; that on April 13, 1910, the plaintiff was a brakeman employed by the defendant on a freight train which was being operated in the vicinity of Little Ferry Junction, in the state of New Jersey; that while the plaintiff in the exercise of his duties, and of due care, was standing upon one of the cars of said train, he was thrown therefrom by the sudden and violent movement thereof and sustained serious bodily injuries; that said injuries were caused by the improper movement of the train upon which the plaintiff was employed by the person in charge of the locomotive engine attached thereto, by the negligent direction of the conductor or other person in control of signals directing the movement thereof, and of some person who at the time had charge or direction of the movement of said train and was acting as superintendent with the authority and consent of the defendant; that there were defects in the brakes or coupling apparatus upon said train which could have been discovered by the use of ordinary care; that the caboose or car upon which plaintiff was stationed had no platform or guard rail, and that the grabirons thereon were defective and improperly and inadequately secured, which was due to the neglect of some person in the employ of the defendant intrusted with the duty of seeing that the cars and appurtenances were in proper and safe condition, which defects are also referred to as causes of the accident. Continuing,

the complaint proceeds to allege that the train was being used by defendant as a common carrier between the states of New York, New Jersey and elsewhere, and that the plaintiff was engaged in such commerce when he was injured, and this is followed by a recital of the provisions of the employer's liability act of the state of New Jersey, and an averment of the service of a notice in accordance with its provisions. These several allegations are set forth in the order in which we have stated them, without being specified or numbered as separate causes of action.

The defendant moved at special term that the complaint be made more definite and certain in the following particulars: (1) "So that it will set forth the physical cause of the accident by a plain statement of the facts by which the accident was caused or out of which it arose, and which is not accomplished by the mere allegation that 'he was thrown therefrom by a sudden and violent action of the train,' nor by the similar allegation of the complaint that 'said injuries were caused by the improper movement of the train upon which the plaintiff was at work.'" (2) "So that it will set forth plainly either a cause of action based on defendant's common-law liability, upon the New Jersey employer's liability act, or one upon the employer's liability act passed by the Congress of the United States in 1908." (3) "Or, if plaintiff desires to set forth three causes of action, that plaintiff separately state and number such causes of action."

The court at special term denied the defendant's motion. An appeal was taken to the appellate division, where an order was made which purports to modify, but in fact reverses, the order of the special term. The order of the appellate division directs the plaintiff to separate and number the causes of action, if he intends to set forth a cause of action other than under the common law; and, since the order of the special term flatly denied the defendant's motion, it is apparent that there was in fact a reversal, although it was called a modification. The distinction is of no importance except to determine the form of the order which we are to make in disposing of this appeal.

There are times when nothing is more troublesome than the simplicity of our code pleading, although in the main it works out for good. The question in this case is whether the plaintiff has pleaded a single cause of action, or several

distinct and separate causes of action. The code of civil procedure (Section 481) directs that a complaint shall contain a plain and concise statement of the facts constituting each cause of action without unnecessary repetition; and that, when a complaint sets forth two or more causes of action, the statement of facts constituting each cause of action must be separate and numbered. Section 483. The code contains no definition of what constitutes a single or separate cause of action, and we must, therefore, draw upon other sources of inspiration for the solution of the question. The term "cause of action," is one which has a technical and primary definition, although in practice it has also acquired a much wider secondary and colloquial meaning. In its simplest analysis the term "cause of action" is synonymous with "the right to bring a suit," and that right is based upon the ground or grounds on which an action may be maintained. There is a more technical and scientific definition which is well stated by Pomeroy, in his standard work on Code Pleading, as follows: "If the facts alleged show one primary right of the plaintiff, and one wrong done by the defendant which involves that right, the plaintiff has stated but a single cause of action. * * * On the other hand, if the facts alleged in the pleading show that the plaintiff is possessed of two or more distinct and separate primary rights, each of which has been invaded, or that the defendant has committed two or more distinct and separate wrongs, it follows inevitably, from the foregoing principle, that the plaintiff has united two or more causes of action." Every lawyer knows that for practical and colloquial uses these terms are frequently given a much broader significance. One has only to scan the judicial opinions in cases arising out of personal injuries to employes to appreciate that they are frequently used interchangeably with the expressions "remedies" or "liabilities." In cases like the one at bar, this is doubtless due to the fact that there are many instances in which the employer may be liable under the common law, and also under one or more statutes which have extended his liability for reasons not cognizable at common law. In such cases the different grounds of liability have sometimes been referred to as "causes of action" when in fact there has been but a single "cause of action" which could be established by evidence appropriate to each of the grounds upon which the employ-

er's liability is predicated, either under the common law or under the statutes.

There are other instances in which the statutes have created a new or extended liability not known at common law. In such cases it is quite accurate to say that the statute which establishes a new liability also creates a new "cause of action," for without the statute none would exist. In one case the right, the wrong, and the "cause of action" may all depend upon the language of the statute, and in another there may be separate and distinct grounds of liability under the common law, and under one or more statutes, which may be so pleaded as to entitle a plaintiff to recover under one or all. Thus, although there may be various grounds of liability, there can be but one cause of action and one recovery. The complaint before us fairly illustrates the difference between a case wholly dependent upon one or more provisions of specified statutes, and one where the defendant's liability may be predicated either upon the common law, the statutes, or both. It sets forth facts which render the defendant liable at common law. It contains other allegations which tend to support a claim under the employer's liability act which is pleaded; and it pleads still other averments which bring the case within the rule of the federal statute. Suppose the plaintiff proves them all. Does that establish three distinct rights in the plaintiff, or three independent wrongs against the defendant, or support three separate recoveries? Obviously there is but one primary right, one primary wrong, and one liability. The single wrong has given rise to a single right, which may be established by as many different facts as the nature of the case may justify or demand. This is the rule which was clearly stated in the early case of *Dickens v. New York Central R. R. Co.*, 13 How. Prac. 228, and which this court has endeavored to consistently follow. That was a case in which the plaintiff sought to recover damages for personal injuries. The complaint contained three separate counts. The second count stated all of the acts of negligence contained in the first count, and one in addition. The third count set forth many acts of negligence not mentioned in the first and second counts. It was held that this was not proper pleading, that the plaintiff had the right to allege in a single count all the different acts of negligence; and that upon the trial the plaintiff could

rely on any or all of the acts of negligence sustained by the evidence. To the same effect is *Whittier v. Bates,* 2 Abb. Prac. 477. The rule was again very clearly stated by Mr. Justice WOODWARD in *Acardo v. New York Contracting & T. Co.,* 116 App. Div. 793, 794, 102 N. Y. Supp. 7, 8. That was a case in which the complaint contained some allegations designed to cover a case at common law, and other averments to support a claim under the employer's liability act. In reversing an order requiring the plaintiff to serve an amended complaint separately stating facts constituting liability under the common law and under the statute the learned justice said: "The plaintiff clearly has but one cause of action, and that is for the damages he has sustained through the actionable negligence of the defendants, if such negligence exists. Whether the facts bring his case within the employer's liability act, or whether he must rely upon his common-law rights, must depend upon the evidence which he is able to produce upon the trial, and we can see no good reason for a refinement of the pleadings such as is directed by the order appealed from. If the plaintiff establishes his cause of action under the employer's liability act, the common-law allegations are mere surplusage, just as a portion of them would be if various common law grounds were asserted, and only one of them proved. In the later case of *Welch v. Waterbury & Co.,* 136 App. Div. 315, 120 N. Y. Supp. 1059, there was an appeal from a judgment based upon a common-law complaint, but submitted to the jury under the employer's liability act. The judgment was reversed upon the ground that the plaintiff had sued upon one theory and had been permitted to recover upon another. The same learned justice who wrote for his court in the *Acardo Case* wrote the opinion in the *Welch Case,* and in the latter he made use of some expressions which seem to indicate that he and his associates had changed their views, but when we look to the two opinions for what was decided, rather than for what was said, we find no inconsistency between them. In the *Acardo Case* the question was one of pleading. In the *Welch Case* the question was whether a judgment could be sustained upon a theory not set forth in the complaint. In the more recent case of *Uss v. Crane* Co., 138 App. Div. 256, 258, 123 N. Y. Supp. 94, 95, the question of pleading was also directly involved, and there the learned appellate division of the first

department held that the defendant was entitled to compel the plaintiff to separately state and number as distinct causes of action grounds of liability under the common law and under the employer's liability act, "so that the defendant could demur to the statutory action if barred." In that case Mr. Justice CLARKE stated that the evident purpose of the employer's liability act "is to give the servant a right of compensation entitling him to a cause of action which he did not formerly possess." In support of this statement he cites the language of Judge GRAY in *Harris v. Baltimore Machine & Elevator Works*, 188 N. Y. 141, 80 N. E. 1028, which, in turn, refers to *Gmaehle v. Rosenberg*, 178 N. Y. 147, 151, 70 N. E. 411, 412, where Judge CULLEN, in speaking of the employer's liability act, says: "It is clear that it has given an additional cause of action where it prescribes that the master shall be liable for the negligence of the superintendent or any person acting as such." When we turn to these cases to see what was decided, it becomes apparent that the expressions quoted from them have been too broadly construed. In the *Gmaehle Case* the sufficiency of the complaint was questioned by demurrer. There the defendant argued that the action was brought under the employer's liability act, and that the complaint was defective because it failed to allege the service of a proper notice under the statute. This court held that the complaint did not purport to state a cause of action under the statute, but was a good pleading under the common law and therefore it was not necessary to plead service of notice. In the *Harris Case* the appeal was from the judgment upon the verdict. At the close of the evidence the trial justice suggested that no common-law right of action had been established. The plaintiff elected to treat the action as one brought under the employer's liability act. Upon appeal to this court, the complaint was held sufficient. In neither of the opinions in these two cases do we find any expression or intimation to the effect that when an injured employe, who sues his employer for damages for negligence, so frames his complaint as to entitle him to give evidence either under the common law or under the statutes or under both, he pleads separate and distinct causes of action which must be set forth in separate and numbered paragraphs. Quite a contrary conclusion must follow when the whole context of these opinions is considered. We think

such a complaint pleads but a single cause of action, although it may specify different acts of negligence, some of which create a liability only under the common law and others of which create a liability only under the statute. This view of the subject is entirely consistent with the statement that the statute may have given an additional or new cause of action, for that is literally true in all cases where the common law affords no relief, and where the only right to recovery is created by the statute. In the *Uss Case* Mr. Justice CLARKE argued, with much force, that the combination of several grounds of liability in a single count of a complaint may prevent a defendant from demurring to such parts thereof as would be plainly open to attack if separately numbered. That may be the result in some cases, but we think it can do little practical harm, since a defendant always has the power to limit the issues and to ascertain what he must meet by demanding a bill of particulars. We are convinced, moreover, that the occasional inconvenience in such instances will be more than offset by a general and consistent adherence to the simpler forms of pleading.

The order of the appellate division should be reversed and that of the special term affirmed, with costs to the appellant in both courts. The first question certified to us is answered in the affirmative; the second and third in the negative.

CULLEN, C. J., and VANN, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur. HAIGHT, J., absent.

Order reversed, etc.[1]

[1] *Accord:* White v. St. Louis & Meramec River Rd. Co. (1907), 202 Mo. 539; National Fuel Co. v. Green (1911), 50 Colo. 307; Thompson v. Keyes-Marshall Bros. Livery Co. (1908), 214 Mo. 487.

HAHL v. SUGO.

Court of Appeals of New York. 1901.

169 New York, 109.

WERNER, J.: This suit was brought to obtain a decree to compel the defendant to remove that portion of the wall of her building which encroaches upon the lands of the plaintiffs. The plaintiffs and the defendant are, and for many years have been, the respective owners of adjoining lots on the west side of Monroe street in the city of Buffalo, between Howard street on the north and Clinton street on the south. In the summer of 1895 the defendant erected a 2½ story brick house upon her lot, the northerly wall of which encroaches upon plaintiffs' lot, as set forth in the findings of the trial court.

In 1896, after said house was completed, the plaintiffs brought an action in the Supreme Court to recover possession of the strip of land thus invaded by the defendant. The action was tried at a trial term, and a jury rendered a verdict in favor of plaintiffs. The defendant paid the costs and took a new trial, under section 1525 of the code of civil procedure. The action was tried a second time, with the same result, and judgment was entered on the 11th day of January, 1898, establishing the plaintiffs' title in fee to the premises in dispute and their right to the possession thereof. That judgment contained a provision directing the defendant to forthwith remove from said premises all obstructions and erections of every kind placed thereon by her. In all other respects it was the ordinary judgment in an action to recover the possession of real property. That provision of the judgment was stricken out by the court on the defendant's motion, and thereafter the plaintiffs issued to the sheriff of Erie county an execution in the usual form. This execution was subsequently returned by the sheriff with an indorsement thereon stating in substance that the strip of land described therein was occupied by a portion of the stone foundation and brick wall of defendant's house, and that it was impracticable for him to remove the same. After such return of the execution, and before the commencement of the action at bar, the plaintiffs made a motion at a special term for an order directing the defendant

to remove that portion of the wall of her house which encroaches upon the plaintiffs' land, which motion was denied.

Thereupon the plaintiffs brought this action in equity to compel the defendant to remove said encroaching walls from their land. The Supreme Court at special term granted the relief prayed for, and the judgment entered upon this decision was unanimously affirmed by the appellate division.

The appeal to this court brings up the question whether two separate actions can be maintained upon a single cause of action.

Section 3339 of the code of civil procedure provides: "There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished." Under section 481 of the code, the requisites of a complaint are simply that it shall contain: (1) "A plain and concise statement of the facts constituting each cause of action, without unnecessary repetition," and (2) "a demand of the judgment to which the plaintiff supposes himself entitled."

These sections of the code, and others which need not be specifically referred to, clearly evince the legislative intent to strip our modern procedure of the cumbrous forms and distinctions which made the practice under the common law and the earlier statutes so burdensome in its details and so uncertain in its results. Upon examining that portion of the code which deals with actions to recover real property (chapter 14, tit. 1, art. 1), we find that the old term "ejectment" has been discarded in the title, and it is now entitled "Actions to recover real property." This change of name was, obviously, a part of the plan of the codifiers to reduce our practice to a simple and composite scheme, under which all the rights of litigants, both legal and equitable, so far as they are consistent with each other and affect the same parties, can be tried in one action and be merged in a single judgment. One of the essential features of such a scheme is to make separate provision for causes of action that are inconsistent with each other or affect different parties or require different places of trial, and this has been done in section 484 and various other kindred sections of the code, which specifies what causes of action may be joined in the same complaint. It is true that

in the chapter of the code relating to actions to recover real property the name and many of the incidents of the former action of ejectment still persist, but this is undoubtedly due to that conservatism of the law which has ever led our legislators and courts to use familiar names, and to reason in old terms, when enacting or construing statutes designed to produce reforms in our law and practice. We shall have occasion further on to refer more specifically to this chapter in its application to the concrete question presented by this appeal.

Let us now see whether the plaintiffs have more than one cause of action arising out of the wrong of the defendant, and, if not, what that cause of action is. The plaintiffs are the owners of a strip of land upon which the defendant has wrongfully entered and erected a wall, which is a portion of her house. The facts alleged show one primary right of the plaintiffs and one wrong done by the defendant which involves that right. Therefore the plaintiffs have stated but a single cause of action, no matter how many forms and kinds of relief they may be entitled to. The relief prayed for, or to which they may be entitled, is no part of their cause of action. Pom. Code Rem. § 455.

The plaintiffs' right is to recover possession of their land. The defendant's wrong consists in the entry upon and use of that land without plaintiffs' consent. The particular nature of that wrong may require the application of different remedies for the enforcement of the right. But that does not change the nature of the cause of action, nor entitle the plaintiffs to split it into several causes of action. The complaint in the first action stated the facts upon which plaintiffs based their claim of title and right to possession. Under its allegations the title as well as the right to possession could be tested. *Cagger v. Lansing,* 64 N. Y. 417. The right to possession involved the removal of the encroaching wall, for without such removal there could be no real transfer of possession. This in turn required equitable relief which, under proper pleadings and an appropriate method of trial, could have been granted in the same action in which the title and right to possession were adjudicated. *Corning v. Nail Factory,* 40 N. Y. 191; *Broiestedt v. Railroad Co.,* 55 N. Y. 220. The fact that plaintiffs' complaint lacked the averments which would have apprised the court of their right to equitable relief, and that the

course of the trial furnished no indication that they intended to claim such relief, is no excuse for the commencement of a separate and independent action upon the single cause involved in the first action. It would be novel practice, indeed, to permit the correction of errors in that summary and extrajudicial manner.

The complaint in the first action did, as we have seen, pray that defendant be required to remove from the premises. The addition to that complaint of a few simple allegations of fact would have established the necessary basis for equitable relief, and that could have been accomplished under the ample power of amendment provided by section 723 of the code. Had the complaint been so amended, the case could have been tried according to the familiar practice which prevails in cases where the issues are to be passed upon by the jury, and the court is called upon to grant equitable relief. *Davis v. Morris,* 36 N. Y. 572. The plaintiffs chose not to avail themselves of these rights, and proceeded to trial precisely as though they claimed, and were entitled to, nothing but legal relief. In the judgment entered upon the second verdict in their first action the plaintiffs did insert a provision for the equitable relief which they now claim, and which was granted in the courts below in the action at bar. This was properly stricken out by the court, because, even if the complaint was one which would have justified such relief, the plaintiffs had not pursued the practice which gave the court the right to grant it.

If we assume, however, that the plaintiffs were entitled to such equitable relief in the first action, and that the court had the power to grant it under the practice adopted, then it was error for the court to have expunged it from the judgment, and the plaintiffs should have appealed from the erroneous decision. *Wright v. Nostrand,* 94 N. Y. 31. In total disregard of this familiar rule of practice, the plaintiffs proceeded to issue execution and collect the costs therein provided for, although they were then as fully cognizant of the facts which rendered fruitless, as they claimed, a mere judgment at law, as they were later on when the action at bar was commenced.

When the sheriff made his return, stating that it was impracticable for him to remove said wall, the plaintiffs made a motion to compel the defendant to remove the same. It requires no discussion to show that this motion was prop-

erly denied. If plaintiffs were entitled to the relief therein sought, it was properly a part of their judgment in the first action, and, as already stated, their motion should have been to vacate that insufficient judgment, and to reopen the case so as to invest the court with the power to proceed in the regular way. But, assuming that the court could have granted the desired relief upon an independent motion, plaintiffs' only remedy in case of a denial thereof was by appeal. *Wright v. Nostrand, supra.*

In the light of these antecedents of the case at bar it seems plain to a demonstration that there is no foundation for it, unless the "action to recover real property," formerly known as "ejectment," is an exception to the comprehensive scheme of the code to abrogate the former distinctions between actions at law and suits in equity. It is urged on behalf of the plaintiffs that it is the usual practice in actions of ejectment to first establish title at law and then, if the legal remedy is inadequate, to proceed in equity for such further relief as may be authorized by the facts of the case. The very authorities cited in support of this argument prove its fallaciousness. *Corning v. Nail Factory,* 40 N. Y. 191, and *Baron v. Korn,* 127 N. Y. 224, were cases in which the equitable remedy was held to have been properly invoked in the first instance, although it was contended in the former, as it is here, that it was proper for the plaintiff to establish title at law before commencing his suit in equity. In *Troy & B. R. Co. v. Boston, H. T. & W. Ry. Co.,* 86 N. Y. 128, the action was based upon a single trespass, without allegation or proof of irreparable injury, and it was to this state of facts that the court applied the dictum that an action at law should be had before a suit in equity will be entertained because, "for aught that now appears, one action at law will suffice." In *Wheelock v. Noonan,* 108 N. Y. 186, 15 N. E. 67, also an action for trespass, the court did extend its equitable aid on the ground that an action at law would not furnish an adequate remedy. In referring to the general rule that a court of equity will act in such cases only after the plaintiff's right has been established at law, the learned writer of the opinion in this court said: "Where the facts are in doubt and the right not clear, such, undoubtedly, would be a just basis of decision, though the modern system of trying equity cases makes the rule less important. Where, as in an intrusion by railroad com-

panies, whose occupation threatens to be continuous, the injury partakes of that character, *an action at law to establish the right has not been required.*" Illustrations of the rule that both legal and equitable relief may be had in the same action may be found in the earlier cases of *Phillips v. Gorham,* 17 N. Y. 270; *Lattin v. McCarty,* 41 N. Y. 107, and *Wright v. Wright,* 54 N. Y. 437, although it must be conceded that proper discrimination has not always been made between single and several causes of action, as distinguished from different kinds of relief upon one cause of action. Turning again from the authorities to the code, the reason for the retention of some of the incidents of the former action of ejectment is apparent. Many, if not most, of the cases to recover real property are actions at law, pure and simple, in which the right of possession, based upon proof of title, can be adequately enforced by execution. The action may be maintained by the landlord against his tenant; or by one whose land, unincumbered by buildings, is withheld, and can be fully restored under a judgment establishing his right of possession; or by another within the limits of whose land structures have been erected by a wrongdoer which pass as a whole to the plaintiff and follow the right to possession of the land. These incidents of the purely legal side of an action to recover real property are not inconsistent with the equitable remedies which may and should be invoked when, as in the plaintiffs' first action, the naked legal judgment establishing title and the right to possession is claimed to be unenforceable by execution.

The application of these principles to the case at bar requires the reversal of the judgment of the courts below and the dismissal of the plaintiffs' complaint; but in view of the hardships visited upon the plaintiffs by the palpable and continuing wrong of the defendant, the reversal should be without costs.

PARKER, C. J., and GRAY, O'BRIEN, LANDON, and CULLEN, JJ., concur. HAIGHT, J., dissents.

Judgment reversed, etc.

CHAPTER III.

JOINDER OF CAUSES OF ACTION.[1]

SECTION 1. MUST ALL BELONG TO SAME CLASS.

THELIN v. STEWART.

Supreme Court of California. 1893.

100 California, 372.

HARRISON, J.: The plaintiff seeks to recover damages from the defendants for injuries sustained by him from their wrongful acts. The complaint is in two counts, each

[1] THE CODE PROVISIONS OF THE VARIOUS STATES UPON THIS SUBJECT ARE AS FOLLOWS:

Alaska. Carter's Ann. Codes, 1900, Code Civ. Pro., § 84.

"The plaintiff may unite several causes of action in the same complaint when they all arise out of—*First*, Contract, express or implied; or *Second*, Injuries, with or without force, to the person; or *Third*, Injuries, with or without force, to property; or *Fourth*, Injuries to character; or *Fifth*, Claims to recover real property, with or without damages for the withholding thereof; or *Sixth*, Claims to recover personal property, with or without damages for the withholding thereof; or *Seventh*, Claims against a trustee by virtue of a contract or by operation of law.

"But the causes of action so united must all belong to one only of these classes, and must effect all the parties to the action and not require different places of trial, and must be separately stated."

Arizona. Rev. St. 1901, § 1291.

"Only such causes of action may be joined as are capable of the same character of relief. Actions ex contractu shall not be joined with actions ex delicto. In actions ex delicto there shall not be joined actions to recover for injuries to the person, to property, or to character; but they shall be sued for separately."

Arkansas. Kirby's Digest, 1904, § 6079.

"Several causes of action may be united in the same complaint, where each affects all the parties to the action, may be brought in the same county, be prosecuted by the same kind of proceedings, and all belong to one of the following classes: *First*, Claims arising out of contract, express or implied. *Second*, Claims for the recovery of specific real property, and the rents, profits and damages for withholding the same. *Third*, Claims for the recovery of specific personal property, and damages for the taking or withholding the same. *Fourth*, Claims for partition of real or personal property, or both. *Fifth*, Claims arising from injuries to character. *Sixth*, Claims arising from injuries to person and property. *Seventh*, Claims against a trustee by virtue of a contract or by operation of law."

of which is stated to be "a separate cause of action" against the defendants. * * * For each of these separate causes of action the plaintiff alleges that he sustained damage in the sum of $2,500, and asks judgment for their ag-

California. Kerr's Codes, Civ. Proc., § 427.

"The plaintiff may unite several causes of action in the same complaint, where they all arise out of: 1. Contracts, express or implied; 2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same; 3. Claims to recover specific personal property, with or without damages for the withholding thereof; 4. Claims against a trustee by virtue of a contract, or by operation of law; 5. Injuries to character; 6. Injuries to person; 7. Injuries to property.

"The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person."

Colorado. Rev. St., 1908, Code Civ. Pro., § 76.

"The plaintiff may unite several causes of action in the same complaint, when they all arise out of any one of the following named classes; *Provided*, They affect all of the same parties, both plaintiff and defendant, and affect them in the same character and capacity; *And provided*, They do not require different places of trial, to-wit:

"*Class First*—Actions to recover specific real property, whether the same be claimed by virtue of superiority of title or by virtue of possessory right, or on account of unlawful detainer or forcible entry; and with such claims may be united any and all claims for damages, for rents in arrear, for profits during any unlawful occupation thereof, and for any waste committed thereon; *Provided*, That all such claims arise from the same property, for the recovery of which the suit is brought.

"*Class Second*—Action to recover specific personal property, with which may be joined any and all claims for damages for the unlawful detention of the same, or for the forcible taking of the same, including in proper cases, claims for exemplary damages, and in case the property cannot be recovered in specie, damages for the unlawful conversion thereof.

"*Class Third*—All actions sounding only in damages, whether the same be for breach of contract, sealed or parol, express or implied, or for injuries to property, person or character, or for any two or more of these causes, and in all cases it shall be necessary to state separately in the complaint the different causes for which the action is brought, and in all cases equitable relief may be granted."

Connecticut. Gen. St., 1902, § 613.

"In every civil action not brought before a justice of the peace, the plaintiff may include in his complaint both legal and equitable rights and causes of action, and demand both legal and equitable remedies; but where several causes of action are united in the same complaint they must all be brought to recover either (1) upon contract, express or implied; or (2) for injuries, with or without force, to person and property, or either, including a conversion of property to defendant's use; or (3) for injuries to character; or (4) upon claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; or (5) upon claims to recover personal property specifically, with or without damages for the withholding thereof; or (6) claims arising by virtue of a contract or by operation of law, in favor of or against a party, in some representative or fiduciary capacity; or (7) upon claims, whether in contract, or tort, or both, arising out of the same transaction or transactions connected with the same subject of action. The several causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages or liens, must

gregate, amounting to $5,000. The defendants demurred to the complaint upon the ground that the several causes of action were improperly united therein, the court overruled their demurrer, and thereafter they answered, and upon the

affect all the parties to the action, and not require different places of trial, and must be separately stated; and in all cases where several causes of action are joined in the same complaint, or as matter of counterclaim or set-off, in the answer, if it appear to the court that they cannot all be conveniently heard together, the court may order separate trials of any such causes of action, or may direct that any one or more of them be expunged from the complaint or answer."

Idaho. Rev. Codes, 1908, § 4169.
Same as the California statute.

Indiana. Burns' Ann. St., 1908, § 279.
"The plaintiff may unite several causes of action in the same complaint, when they are included in either of the following classes: *First*, Money demands on contract. *Second*, Injuries to property. *Third*, Injuries to person or character. *Fourth*, Claims to recover the possession of personal property, with or without damages for the withholding thereof, and for injuries to the property withheld. *Fifth*, Claims to recover the possession of real property, with or without damages, rents, and profits for the withholding thereof, and for waste or damages done to the land; to make partition of and to determine and quiet the title to real property. *Sixth*, Claims to enforce the specific performance of contracts, and to avoid contracts for fraud or mistake. *Seventh*, Claims to foreclose mortgages; to enforce or discharge specific liens; to recover personal judgment upon the debt secured by such mortgage or lien; to subject to sale real property upon demands against decedents' estates, when such property has passed to heirs, devisees, or their assigns; to marshal assets; and to substitute one person to the rights of another; and all other causes of action arising out of a contract or a duty, and not falling within either of the foregoing classes. But causes of action so joined must affect all the parties to the action, and not require different places of trial, and must be separately stated and numbered."

Iowa. Code, 1897, § 3545.
"Causes of action of whatever kind, where each may be prosecuted by the same kind of proceedings, if held by the same party, and against the same party, in the same rights, and if action in all may be brought and tried in that county, may be joined in the same petition; but the court may direct all or any portion of the issues joined to be tried separately, and may determine the order thereof."

Kansas. Gen. St., 1909, § 5681.
"The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both. But the causes of action so united must affect all the parties to the action, except in actions to enforce mortgages or other liens."

Kentucky. Code, 1895, § 83.
"Several causes of action may be united, if each affect all the parties to the action, may be brought in the same county, and may be prosecuted by the same kind of action; and if all of them be brought—1. Upon contracts, express or implied; or, 2. For the recovery of real property and the rents, profits and damages for withholding it; or 3. For the recovery of specific personal property, and damages for the taking or withholding it, or 4. For partition of real or personal property, or both; or, 5. For injuries to character; or, 6. For injuries to person and property."

Minnesota. Rev. Laws, 1905, § 4154.
"Two or more consistent causes of action, whether legal or equitable, may

trial of the cause judgment was rendered against them for the sum of $650. From this judgment they have appealed upon the judgment roll alone, upon the ground that their demurrer was improperly overruled.

be united in one pleading, being separately stated therein: Provided, that they must affect all parties to the action, must not require separate places of trial, and must be included in one only of the following classes: 1. The same transaction, or transactions connected with the same subject of action; 2. Contracts, express or implied; 3. Injuries to either person or property, or both; 4. Injuries to reputation; 5. For the recovery of real property, with or without damages for withholding the same, and of the rents and profits thereof; 6. For the recovery of personal property, with or without damages for withholding the same; or 7. Claims against a trustee by virtue of a contract, or arising by operation of law."

Missouri. Ann. St., 1906, § 593.

"The plaintiff may unite in the same petition several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of: 1. The same transaction or transactions connected with the same subject of action; or, 2, contract, express or implied; or, 3, injuries, with or without force, to person and property, or either; or, 4, injuries to character; or, 5, claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; or, 6, claims to recover personal property, with or without damages for the withholding thereof; or, 7, claims by or against a party in some representative or fiduciary capacity, by virtue of a contract, or by operation of law. But the causes of action so united must all belong to one of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated, with the relief sought for each cause of action, in such manner that they may be intelligibly distinguished."

Montana. Rev. Codes, 1907, § 6533.

"The plaintiff may unite several causes of action, legal or equitable, or both, in the same complaint, where they all arise out of: 1. Contracts, express or implied. 2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same, and for an injunction to stay waste or injury thereto. 3. Claims to recover specific personal property, with or without damages for the withholding thereof. 4. Claims against a trustee by virtue of a contract or by operation of law. 5. Injuries to character. 6. Injuries to person. 7. Injuries to property.

"The causes of action so united must all appear on the face of the complaint, to belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated and numbered; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person."

Nebraska. Comp. St., 1911, §§ 6661, 6662, 6667.

"The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, when they are included in either of the following classes: 1. The same transaction or transactions connected with the same subject of action. 2. Contracts, express or implied. 3. Injuries, with or without force, to person and property, or either. 4. Injuries to character. 5. Claims to recover the possession of personal property, with or without damages for the withholding thereof. 6. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same. 7. Claims against a trustee by virtue of a contract, or by operation of law."

Section 427, code civ. proc., authorizes the plaintiff to unite in the same complaint several causes of action "where they all arise out of * * * (6) injuries to person; (7) injuries to property;" but the same section also declares

"The causes of action so united, must affect all the parties to the action, and not require different places of trial."

"Where the petition contains more than one cause of action, each shall be separately stated and numbered."

New Mexico. Comp. Laws, 1897, Civ. Pro., § 33.
Identical with the Missouri statute, *supra.*

Nevada. Comp. Laws, 1900, § 3159.
Identical with the California Statute, *supra*, except for a few slight verbal variations.

New York. Chase's Code, Civ. Pro., 1910, § 484.
"The plaintiff may unite in the same complaint, two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover as follows: 1. Upon contract, express or implied. 2. For personal injuries except libel, slander, criminal conversation or seduction. 3. For libel or slander. 4. For injuries to real property. 5. Real property, in ejectment, with or without damages for the withholding thereof. 6. For injuries to personal property. 7. Chattels, with or without damages for the taking or detention thereof. 8. Upon claims against a trustee, by virtue of a contract or by operation of law. 9. Upon claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section. 10. For penalties incurred under the forest, fish and game law. 11. For penalties incurred under the agricultural law. 12. For penalties incurred under the public health law.
"But it must appear, on the face of the complaint, that all the causes of action, so united, belong to one of the foregoing subdivisions of this section; that they are consistent with each other; and, except as otherwise prescribed by law, that they affect all the parties to the action; and it must appear upon the face of the complaint, that they do not require different places of trial."

North Carolina. Revisal of 1905, § 469.
"The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of—1. The same transaction, or transactions connected with the same subject of action; or, 2. Contract, express or implied; or, 3. Injuries with or without force to person and property, or to either; or, 4. Injuries to character; or, 5. Claims to recover real property, with or without damages for the withholding thereof; and the rents and profits of the same; or, 6. Claims to recover personal property, with or without damages for the withholding thereof; or, 7. Claims against a trustee, by virtue of a contract, or by operation of law.
"But the causes of action so united must all belong to one of these classes, and except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated." [Followed by certain provisions as to the foreclosure of mortgages.]

North Dakota. Rev. Codes, 1905, § 6877.
Identical with the North Carolina statute, *supra*, so far as there quoted, with the following added to the 5th class,—"or waste committed thereon."

Ohio. Gen. Code, 1910, §§ 11306, 11307, 11308.
"The plaintiff may unite several causes of action in the same petition, whether they are legal or equitable, or both, when they are included in any of the following classes: 1. The same transaction; 2. Transactions connected with the same subject of action; 3. Contracts, express or implied; 4. Injur-

that "the causes of action so united must all belong to only one of these classes." The cause of action set forth in the first count of the complaint is for an injury to the person of the plaintiff, while that which is set forth in the second

ies to person and property, or to either; 5. Injuries to character; 6. Claims to recover the possession of personal property, with or without damages for withholding it; 7. Claims to recover real property, with or without damages for withholding it, its rents and profits, and the partition thereof; 8. Claims to foreclose a mortgage given to secure the payment of money or to enforce a specific lien for money, and to recover a personal judgment for the debt secured by such mortgage or lien; 9. Claims against a trustee by virtue of a contract, or by operation of law."

"The causes of action so united must not require different places of trial, and, except as otherwise provided, must affect all the parties to the action."

"When the petition contains more than one cause of action, each cause must be separately stated and consecutively numbered."

Oklahoma. Comp. Laws, 1909, §§ 5623, 5628.

Identically the same as the first paragraph of the Nebraska statute, *supra*, adding,

"But the causes of action so united must all belong to one of these classes, and must affect all the parties to the action, except in actions to foreclose mortgages or other liens."

"Where the petition contains more than one cause of action each shall be separately stated and numbered."

Oregon. Lord's Laws, 1910, Code Civ. Pro., § 94.

Identically the same as the Alaska statute, *supra*.

South Carolina: Code of Laws, 1902, Civ. Pro., § 188.

Identically the same as the North Carolina statute, *supra*.

South Dakota. Rev. Codes, 1903, Civ. Pro., § 144.

Identically the same as the North Carolina statute, *supra*, with the following added to the 5th class,—"or for waste committed thereon."

Utah. Comp. Laws, 1907, § 2961.

"The plaintiff may unite in the same complaint several causes of action, legal or equitable, or both, where they all arise out of: 1. The same transaction, or transactions connected with the same subject of action; or, 2. Contract, express or implied; or, 3. Injuries, with or without force, to person and property, or either; or, 4. Injuries to character; or, 5. Claims to recover real property with or without damages for the withholding thereof, and the rents and profits of the same, or waste committed thereon; or, 6. Claims to recover personal property with or without damages for the withholding thereof; or, 7. Claims against a trustee by virtue of a contract, or by operation of law.

"But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated."

Washington. Rem. & Ball. Codes, § 296.

Identically the same as the first paragraph of the Alaska statute, as quoted *supra*, adding,

"3. The same transaction.

"But the causes of action so united must affect all the parties to the action, and not require different places of trial, and must be separately stated."

Wisconsin. St., 1898, § 2647.

Identically the same, with a slight verbal variation, as the first paragraph of the North Carolina statute as quoted *supra*, adding,

"But the causes of action so united must all belong to one of these classes

count is for an injury to his property; and, in addition to being alleged to be "a separate cause of action," appears from the facts alleged to have arisen subsequent to the occurrence of the facts set forth in the first count. For this reason, therefore, the demurrer to the complaint should have been sustained.

* * * * * * * * * * *

The judgment is reversed.

PATERSON, J., and GAROUTTE, J., concurred.

HAWK v. THORN.

Supreme Court of New York. 1869.

54 Barbour, 164.

Appeal by the defendants from an order made at a special term, overruling a demurrer to the complaint.

* * * * * * * * * * *

The defendants demurred to the complaint, on the ground that it appears upon the face thereof that several causes of action have been improperly united—one being a money demand on contract, and the second an action of trover sounding in tort, to recover damages for wrongful conversion. * * *

[The first count of the complaint stated a cause of action for the sale and delivery of certain hogs; the second count

and must affect all the parties to the action, and not require different places of trial, and must be stated separately."

Wyoming. Comp. St., 1910, §§ 4337, 4380.

"The plaintiff may unite several cases of action in the same petition whether they are such as have heretofore been denominated legal or equitable or both, when they are included in either of the following classes: 1. The same transaction, or transactions connected with the same subject of action. 2. Contracts, express or implied. 3. Injuries to person and property, or to either. 4. Injuries to character. 5. Claims to recover the possession of personal property, with or without damages for the withholding thereof. 6. Claims to recover real property, with or without damages for the withholding thereof, the rents and profits of the same and the partition thereof. 7. Claims against a trustee, by virtue of a contract or by operation of law."

"The causes of action so united must not require different places of trial, and, except as otherwise provided, must affect all the parties to the action."

"When the petition contains more than one cause of action, they shall be separately stated and numbered."

alleged the conversion of a calf and assumpsit for the amount received from its sale.][1]

CARDOZO, J.: The objections raised in this case are not tenable. When a person has unlawfully taken possession of another's property, the tort may be waived, and an action brought for its value. Such a cause of action is assignable. Both causes of action set forth in the complaint are founded on contract, the first express, and the other implied by law, and are properly joined.

The order below was right, and should be affirmed with costs.[2]

McARTHUR v. MOFFETT.

Supreme Court of Wisconsin. 1910.

143 Wisconsin, 564.

WINSLOW, C. J.: The complaint contains two counts: The first states a statutory cause of action under section 3186, St. 1898, to quiet plaintiff's title to a number of tracts of unoccupied land to which the defendants "make some claim." The second states a cause of action at law to recover damages for trespass and the cutting of timber on said lands prior to the commencement of the action. A demurrer to this complaint for improper joinder of causes of action was overruled, and the defendants appeal.

The exact question presented is whether a statutory cause of action to quiet title to land and a cause of action for trespass on the same land "arise out of the same transaction or transactions connected with the same subject of action" within the meaning of subdivision 1, § 2647, St. Wis. 1898. These words are found in the first subdivision of that section of our code, which authorizes the joinder of different causes of action in the same complaint. They were first introduced into the New York code by amendment in 1852. They were incorporated into our original code in 1856, and have remained there unchanged since that date. They are

[1] Condensation by the editor.

[2] *Accord:* Logan v. Wallis (1877), 76 N. C. 416; Stewart v. Balderston (1873), 10 Kan. 131.

also to be found substantially unchanged in the codes of nearly if not quite all of the code states. It would seem that at this late date there ought to be little doubt as to their true scope and meaning. Court and text-writers have been busy for more than half a century drafting and redrafting definitions of the words "transaction" and "subject of action" as new cases have presented themselves, but, on the whole, it may well be doubted whether the discussions have resulted in clarity of thought. The words are general to the last degree; indeed, they must be so for they are intended to provide for and apply to the myriad difficulties that may arise between man and man in all kinds of situations, and no words of limited or narrow meaning could be used.

The difficulty lies, not merely in the unfortunate paucity and poverty of human language, but in the equally unfortunate incapacity of the human mind to appreciate in advance and provide for future difficulties arising out of new situations and complications.

* * * * * * * * * * *

Again, it is very apparent that the dominant idea was to permit joinder of causes of action legal or equitable in case there was some substantial point of unity between them. It was contemplated evidently that this point of unity might be very near to the causes of action—i. e., that both causes of action might arise directly out of the same event or affair (called a "transaction" in the statute) in which case they were joinable—and it was also contemplated that the point of unity might be further off in the chain of events—i. e., that, while the two causes of action had their immediate inception in different "transactions," still, if these different transactions were both connected with one fundamental matter or thing or combination of matters or things called the "subject of action," there was still a sufficient element of unity to justify their being joined in one action. Now it is manifest that the principal difficulty here consists in the meaning of the term "subject of action." The words "cause of action" and "transaction" present no very serious difficulties, but "subject of action," as before said, is a very general and comprehensive term which must be applied to very many and very diverse situations. It is relatively easy to give it a definition in terms equally general, for instance one can say that it is some fundamental

matter or thing common in greater or less degree to each cause of action and without the prior existence of which the cause of action itself could have no existence, but this definition affords little help in applying the words to a concrete case. The definition is as general and vague as the words which it is supposed to define.

* * * * * * * * * * *

The intimate relationship between the three terms, "cause of action," "transaction," and "subject of action," in the sentence, however, and the evident necessity of the drawing of some fairly accurate distinction between them in order that the true significance of the latter term may be arrived at, renders it proper, if not absolutely necessary, to consider them all. As the meaning of the first two terms seems to be quite well settled, both in this state and in the code states generally, it seems wise to take them up first in the discussion.

1. The term "cause of action" occurs several times in the original Wisconsin code. Perhaps its appearance is most significant in subdivision 2 of section 47 of that code (chapter 120, laws 1856), now subdivision 2 of section 2646 of the statutes of 1898, which provides that the complaint shall contain "a plain and concise statement of the facts constituting a cause of action without unnecessary repetition." This makes it very clear that in the minds of the makers of the code the "cause of action" is made up of the facts necessary to be pleaded and proved in order to establish the defendant's liability to the plaintiff. These must be of two classes: (1) The facts which show the plaintiff's right, and (2) the facts which show the defendant's violation of that right.

Pomeroy says (Pomeroy, Code Remedies [4th Ed.] § 347):

"The cause of action as it appears in the complaint, when properly pleaded, will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding duty have arisen together with the facts which constitute the defendant's delict or act of wrong."

Substantially this definition is supported by the authorities generally. It is supported in this state in *Bruil v. N. W. Mutual Relief Ass'n*, 72 Wis. 430, 39 N. W. 529. Rapalje's definition is there quoted, "The fact or combina-

tion of facts which give rise to a right of action," and it is said: "A cause of action does not arise until the facts exist which constitute the cause of action, and not merely the one fact which may be the breach of duty." In *South Bend C. P. Co. v. Cribb Co.*, 105 Wis. 443, 81 N. W. 675, it is said: "In every cause of action there must exist a primary right, a corresponding primary duty, and a failure to perform that duty." In *Emerson v. Nash*, 124 Wis. 369, 387, 102 N. W. 921, 928, it is said: "A cause of action consists of those facts as to two or more persons entitling at least one of them to a judicial remedy of some sort against the other or others for the redress or prevention of a wrong. * * * There should be a right to be violated and a violation thereof."

There seems no logical escape from the conclusion that the term "cause of action" must include the facts showing (1) the plaintiff's right; (2) the defendant's corresponding duty; and (3) the defendant's breach of that duty, or, to put it more tersely, the plaintiff's right and its violation by the defendant.

2. The word "transaction" is defined in Pomeroy's Code Remedies (4th Ed.) § 473, as follows: "A negotiation, or a proceeding, or a conduct of business, between the parties of such a nature that it produces as necessary results a primary right or rights in favor of the plaintiff and wrongs done by the defendant which are violations of such right or rights."

In *Craft Refrigerating Machine Co. v. Quinnipiac Brewing Co.*, 63 Conn. 551, 29 Atl. 76, 25 L. R. A. 856, it is defined as "something which has taken place whereby a cause of action has arisen. It must * * * consist of an act or agreement or several acts or agreements having some connection with each other in which more than one person is concerned and by which the legal relations of such persons between themselves is altered."

This court defines it in the *Emerson Case*, 124 Wis. 369, at page 389, 102 N. W. 921, at page 928 (70 L. R. A. 328, 109 Am. St. Rep. 944), as follows: "Any event in which two or more persons are actors involving a right which may presently, or by what may proximately occur in respect thereto, be violated, creating redressible wrong, is a transaction within the meaning of the statute." This seems practically to be the same as Pomeroy's definition.

In *Scarborough v. Smith*, 18 Kan. 399 (a very interesting and instructive case), it is defined thus: "A transaction is whatever may be done by one person which affects another person's rights, and out of which a cause of action may arise."

At first glance both Pomeroy's definition and the definition given in the *Emerson Case* might seem to imply that both parties to the action must be active participants in the event or affair in order that it constitute a "transaction." If this were so, neither a trespass on land in the absence of the owner, nor an unfounded claim of title to land in like absence, would amount to a transaction, and it would necessarily follow that neither cause of action here stated arises out of a "transaction" within the meaning of the statute, and hence there could be no connection between either cause of action and the subject of the action.

The definitions referred to, however, do not, when properly understood, mean that both parties must actually be present in order that an event or affair may arise to the dignity of a transaction. If the act of one person wrongfully invades or infringes upon the right of another, there is undoubtedly a "transaction," though the injured party be not physically present. He may, in such case, truly be called a participant in the act because he is represented by his right which is invaded or violated by his adversary's act. The definition in the Kansas case cited exactly fits this view. With this understanding of its meaning, there seems no reason to doubt that the definition given by this court in the *Emerson Case* is substantially correct.

3. We pass now to the consideration of the phrase "subject of action," which presents much greater difficulty as well as greater confusion in the authorities. We start with a proposition which seems to us incontrovertible, namely, that the makers of the code not only had some definite and certain idea in mind when they used these words but that such idea was a different idea from the ideas embodied in the words "cause of action" or "transaction."

It is entirely true that in literature, logic, and grammar the word "subject" means that which is treated of, the theme of discourse, or that of which something is affirmed or predicated; hence it could logically be said, if there were no other considerations to be kept in view, that the subject of an action is the defendant's invasion of the plaintiff's

right, because this is the matter which is the paramount theme treated of. It by no means follows, however, that this definition can or ought to be applied here. The question is not necessarily what do literary purists or lexicographers mean by the word, although this is helpful and should be considered, but what did the legislature mean by it? * * *

In the original Wisconsin code the term was used at least seven times, including the instance under discussion. The first instance seems to be in section 21 (chapter 120, Laws 1856), now section 2602, St. 1898, which provides that "all persons having an interest in the *subject of the action* and in obtaining the relief demanded may be joined as plaintiffs." The inference here would seem to be that tangible property might in some cases at least be considered the subject of the action, but perhaps the inference is not very persuasive, and we pass to the next instance of the use of the term which occurs in section 27 of the original code, now appearing in slightly altered form as section 2619, St. Wis. 1898. This section provides that four classes of actions must (subject to the power of the court to change the venue) be tried in the county in which the *subject of the action* or some part thereof is situated. These classes of actions are (1) actions for the recovery of real property, or of any estate or interest therein, or for the determination in any form of such right or interest or for injuries to real property; (2) actions for the partition of real property; (3) actions for the foreclosure of a mortgage of real property; and (4) actions for the recovery of personal property distrained for any cause. It will be noticed that these are all actions involving either the title or some interest in or lien upon specific real or personal property. Now, can there be any doubt from the language of the section and the careful grouping of these actions which all involve specific tangible property, that the legislature meant to refer to that specific tangible property as the subject of the action, and to require that the action be tried in the county where it is situated? Again, is there any doubt that the profession and the courts have so construed the section without question from 1856 up to the present time? We believe no case will be found in this state where it has been even suggested by the court or counsel that this section means anything but that the actions named are local

actions whose locality (subject to change of venue for sufficient cause) is fixed by the locality of the real or personal property involved, which real or personal property is called by the legislature the "subject of the action." *Young v. Lego*, 38 Wis. 206; *West v. Walker*, 77 Wis. 557, 46 N. W. 819.

But any lingering doubt as to the meaning of the term here must surely be removed when we consider subdivisions 3 and 4 of section 40 of the original code, now found in expanded form in subdivisions 1, 3 and 7 of section 2639 of the statutes of 1898. This section provides for service of the summons by publication where personal service cannot be made. Such substituted service may be made under these subdivisions (1) where the defendant is a nonresident, but has property within the state, and the action is on contract, "and the court has jurisdiction of the *subject of the action;*" and (2) where "the *subject of the action* is real or personal property in this state and the defendant has or claims a lien or interest actual or contingent therein, or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein." Here it is definitely stated that there are actions in which the subject of action is real or personal property. Here, also, we think, there has been a universal consensus of opinion among lawyers and courts that the last-mentioned clause was intended to, and did, apply to all controversies involving the title of specific real or personal property situated within the state, and that in such cases there could be service by publication, because of the fact that such property was the subject of the action, and was within the state.

In section 49 of the original code, now section 2649, St. 1898, it is provided that the defendant may demur to the complaint when it appears upon the face thereof that the court has "no jurisdiction * * * of the subject of the action," and in section 55, Id., now section 2656, St. 1898, it is provided that the defendant may interpose by way of counter-claim "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the *subject of the action,*" and, lastly, in section 73, Id., now section 2647, St. 1898, we find the provision for joinder of causes of action legal or equitable "where they arise out of the same trans-

action or transactions connected with the *same subject of action.*"

Some time and space has been spent in collating and considering these various instances of the use of the term "subject of action" in the original code, not only to show that it must have been used by the code makers deliberately and advisedly, but also because it seems that in many of the discussions of its meaning as used in the joinder and counterclaim sections there has been little or no attention paid to the help which might be derived from considering the obvious meaning attached to it when used in the other sections above referred to. Possibly some of the confusion in the authorities might have been avoided had all the provisions of the act in which the term is used been viewed together. That there is much confusion upon the subject, both in the decisions and in the text-books, cannot be denied, and there seems to be as much in Wisconsin as elsewhere. In *Scheunert v. Kaehler,* 23 Wis. 523, it was said, considering the counterclaim statute, that the subject of an action for conversion of money was the "tort or wrong committed," and in *Stolze v. Torrison,* 118 Wis. 315, 95 N. W. 114, it was said of an action of trespass upon real estate that the subject of the action is not the land nor the title to the land, but the torts alleged. These two cases seem to indicate that in actions for torts committed upon property the tort, and not the property, is the subject of the action.

On the other hand, it is said in *Cornelius v. Kessel,* 58 Wis. 237, 16 N. W. 550 (still considering the counterclaim statute), that in ejectment "the subject of the action is the land in controversy," and in *Kruczinski v. Neuendorf,* 99 Wis. 264, 74 N. W. 974, it is said that an equitable cause of action to remove a cloud fraudulently placed on the title of land and a legal cause of action to recover possession of the land with rents and profits for its use may be joined under the statute because "the subject of the action is the land." In *Leinenkugel v. Kehl,* 73 Wis. 238, 40 N. W. 683, which was an action to quiet title to land, the conclusion seems to be based upon the idea that the land is the subject of the action, although the proposition is not definitely stated in the opinion. In *Grignon v. Black,* 76 Wis. 674, 45 N. W. 122, 938, which was an action to quiet title, it was said, considering the counterclaim statute, that the subject of the

plaintiff's action was "their title and right of possession to the land in question."

The radical inconsistency in these holdings is very apparent. In a trespass action, which is brought to redress a wrongful entry on land, the subject is the tort and not the land. In an ejectment action, which is brought to redress a wrongful holding of land, the subject is the land, and not the tort, while in *quia timet* the subject is said in one case to be the land itself, and in another to be the plaintiff's title and right of possession of the land.

But this is not all. As we have seen, it was held in the *Scheunert Case* in the twenty-third Wisconsin that in an action for conversion the subject was the tort or wrong committed, but in the later case of *Mulberger v. Koenig*, 62 Wis. 558, 22 N. W. 745, which was an action in equity to prevent the wrongful obstruction of a mill race, it was said that the subject of the action "is nothing more or less than the facts constituting the plaintiff's causes of action." This latter case was followed in *Telulah Paper Co. v. Patton Paper Co.*, 132 Wis. 425, 112 N. W. 522 (another water power case), where it was said that the subject of the plaintiff's action is "his right and the invasion of that right" by the defendant, and this definition was approved and applied in *Brahm v. M. C. Gehl Co.*, 132 Wis. 674, 679, 112 N. W. 522.

Now, can it be possible that it is true that the subject of the action, as the term is used in the code, means the plaintiff's right and the defendant's invasion of that right? If so, then it is synonymous with "cause of action," and we should be able to substitute the words "subject of the action" for "cause of action" wherever they occur in the code, and *vice versa*. It is very certain that we cannot do this without making nonsense of the code and convicting its authors of the reckless use of misleading language in the crucial paragraphs of a law which was intended to completely revolutionize all legal procedure.

* * * * * * * * * * *

It seems very evident to us that the cases in this court cannot be harmonized, and we shall not undertake the task. The confusion is hopeless. Looking to the decisions in New York and other code states, as well as to the attempts of text-writers to solve the difficulty, we find the same confused condition. To attempt to analyze the decisions would be

impossible within any permissible limits, but the conclusions of the leading text-writers may profitably be considered.

Mr. Pomeroy, in his valuable work on Code Remedies, has made three attempts to define the term "*subject of action.*" At section 369 (4th Ed.) he says:

"The term 'subject of action' found in the code in this and one or two other sections was doubtless employed by its authors and the legislature as synonymous with or rather in place of 'subject-matter of the action.' I can conceive of no other interpretation which will apply to the phrase and meet all the requirements of the context. Subject-matter of the action is not the cause of action nor the object of the action. It rather describes the physical facts, the things real or personal, the money, lands, chattels, and the like in relation to which the suit is prosecuted. It is possible, therefore, that several different transactions should have a connection with this subject-matter, or, what seems to me to be the same thing, with this subject of action."

This seems a fairly definite and workable definition as applied to actions relating to specific real or personal property, but in section 384 of the same work, after discussing and criticizing the definition given by Mr. Calvert in his work on Parties, he says:

"In equitable actions there is generally, if not quite always, a fund, or estate, or property, which is the subject of the suit, as well as questions concerning the same to which the term may also be applied. The provisions of the codes, however, embrace legal actions; and in them it cannot generally be said that there is any fund, property, or estate in relation to which the questions at issue have arisen, and which can be regarded as the 'subject.' In a very large proportion of legal actions, therefore, the term 'subject' of the action' can only be conceived of in the second sense which has been attributed to it, and denotes the totality of questions at issue between the parties, embracing, in short, both the primary rights and duties of the litigants, and the remedial rights and duties which have sprung from the injuries complained of. The term does not seem capable of any clear and complete analysis, and the result is that it may denote the 'thing' if any—land, chattel, person, fund, estate, and the like—in respect of which rights are sought to be maintained and duties enforced, or it may denote the

sum of the questions between the parties to be determined by the judgment of the court. The latter meaning is distinguishable, and is to be distinguished from the 'object of the action,' which is always the relief to be obtained by the determination of the questions which constitute the 'subject of the action.' "

This seems sufficiently vague and confusing, but, when we come to the discussion of the term under the counterclaim section, at section 651 of the same work, we find a definition which seems to disregard the previous discussions entirely, viz.:

"It would, as it seems to me, be correct to say in all cases, legal or equitable, that the 'subject of the action' is the plaintiff's main *primary right,* which has been broken, and by means of whose breach a remedial right arises. Thus the right of property and possession, ejectment and replevin, the right of possession in trover or trespass, the right to the money in all cases of debt, and the like, would be the 'subject' of the respective actions. Although in a certain sense and in some classes of suits the things themselves, the land or chattels, may be regarded as the 'subject,' and are sometimes spoken of as such, yet this cannot be true in all cases; for in many actions there is no such specific thing in controversy over which a right of property exists. The primary right, however, always exists, and is always the very central element of the controversy around which all the other elements are grouped, and to which they are subordinate. In possessory and proprietary actions this right, which will then be always one of property or of possession, will be intimately associated with the specific thing itself which is the *object* of the right; but this relation is not, and cannot be, universal. It seems, therefore, more in accordance with the nature of actions and more in harmony with the language of the statute to regard the 'subject of the action' as denoting the plaintiff's *principal primary right* to enforce or maintain which the action is brought than to regard it as denoting the specific thing in regard to which the legal controversy is carried on. In this manner alone can we arrive at a *general* rule applicable to all possible cases, and the rule thus reached fully satisfies all the requirements of the legislative language, and can be invoked in all classes of actions. . While I suggest and adopt this meaning of the term 'subject,' I freely concede that no de-

cision, so far as I have discovered, pronounces this interpretation to be the only one admissible. Many cases sanction it, none directly reject it; but none, on the other hand, have gone so far as to declare in its favor to the exclusion of all other meanings. The construction proposed, as it has been judicially approved in many instances, would remove all doubt and conflict of opinion, and would furnish a simple and practical rule of universal application."

Acknowledging as we do Mr. Pomeroy's very valuable services to the profession and to the law, we think it must be admitted that he also has left the question of the meaning of "subject of action" in great confusion.

Mr. Nichols in volume 1 of his work on New York Practice, at page 68, quotes Mr. Pomeroy's first definition, "the physical facts, the things, real or personal, the money, lands, chattels and the like in relation to which the suit is prosecuted," and escapes any further difficulty by not attempting any additional discussion of the subject.

Mr. Bliss on his work on Code Pleading (3d Ed.) has also attempted to reach a conclusion on the subject and perhaps with some greater degree of success. Thus he says at section 126:

"The cause of action has been described as being a legal wrong threatened or committed against the complaining party, and the object of the action is to prevent or redress the wrong by obtaining some legal relief. The subject of the action is clearly neither of these. It is not the wrong which gives the plaintiff the right to ask the interposition of the court, nor is it that which the court is asked to do for him, but it must be the matter or thing, differing both from the wrong and the relief, in regard to which the controversy has arisen, concerning which the wrong has been done; and this is ordinarily the property or the contract and its subject-matter or other thing involved in the dispute."

He then proceeds to state what he deems to be the subject-matter of various contract actions and proceeds with the consideration of tort actions, as follows:

"In an action for a tort, the injury complained of is the wrong, and the subject of the action would be that right, interest (relation), or property which has been affected—as, in replevin or trover, the property taken; for libel or slander, the plaintiff's character or occupation; for an injury to a servant, the service; for the seduction of, or for

harboring, a wife, the marital relation; for negligence, the duty, property, or person in respect to which the negligence occurred; for false imprisonment, the plaintiff's liberty; and for trespass upon property, the property."

He also clearly appreciates that the words should be held to mean the same thing wherever used, and in section 373 makes the following observations concerning the term as used in the counterclaim statute:

"I know of no reason why the same interpretation should not be given it in this connection as when it is used to designate a class of causes of action that may be united in one proceeding, and the reader is referred to the view heretofore taken. This general view is not elaborated in any of the reported cases. It is not, perhaps, the duty of judges to write essays, only to apply the law to the facts before them, but by a preponderance of authority it is recognized and the cloudiness, if not blunders, that are seen in this connection have arisen chiefly from a failure to distinguish the 'subject' of the action from the 'cause,' or from the 'object' of the action, or from the facts which constitute it. Our system of pleading will never be reduced to scientific accuracy until the statutory phrases embody it come to have a fixed signification. Technics are essential to exact knowledge. The pleader may state in common language the facts that constitute his cause of action because he describes the common events of life, and yet, at every step, he is controlled by the stern rules of legal logic. Looseness, indefiniteness, uncertainty in the interpretation of phrases that control his action leave him wholly at sea, and tossed about by the shifting winds of mere opinion, or, perhaps, caprice. It is because a fixed and definite meaning has not been given to the term 'subject of action,' because it so often fails to present to the mind any distinct conception, that we find so many differences of opinion in respect to this class of counterclaims, and, as we shall presently see, nowhere does the conception seem to be less certain than in the great state to whose jurisprudence we owe so much, and whose enlightened bar first called the new system into existence."

In this connection we will again refer to the case of *Scarborough v. Smith,* 18 Kan. 399, where under the joinder clause which we are considering it was held that an action of ejectment, an action to recover the value of the rents and profits of the same property, and an action for partition

thereof could be joined because they all arose out of transactions connected with one subject of action, which was said to be "the right to use and enjoy in the manner he chooses his interest in said real property with all the proceeds and avails thereof," and it is further said: "Of course, the *subject* of action is not the *cause* of action or the cause of *any* action or *any cause* of action. It is simply one of the elements of each of the several causes of action uniting and binding them together in one section."

We are not to be understood as approving without qualification the propositions laid down by Pomeroy and Bliss in the quoted paragraphs. The quotations have been made rather for the purpose of showing the drift of thought on the subject in two acute legal minds. We do not propose in the present case to attempt to lay down any hard and fast definition which shall be applicable to all cases which may arise. "Sufficient unto the day is the evil thereof."

But we feel that we must recede from the proposition laid down in the *Telulah Case* (132 Wis. 425, 112 N. W. 522), to wit, that the subject of the action is composed of the plaintiff's right and the defendant's invasion thereof. If the phrase stood alone, this might be logically correct, but when we face the fact that we must differentiate "*subject of action*" from "*cause of action,*" and when we also know that the definition last quoted *must* be applied to "*cause of action,*" we must find some other meaning for "subject of action."

It seems probable, as Mr. Pomeroy suggests, that the code makers used the term having in mind the term "*subject-matter of the action,*" which was in use before the code, and which is defined by Bouvier as "the cause, the object, the thing in dispute." It seems also probable that they had in mind equitable actions involving complicated matters arising out of and surrounding a single parent stem or primary right, which manifestly ought to be all handled at the same time and by the same court in order to settle closely related rights; but we cannot assent to the suggestion of Mr. Pomeroy (Section 369, id.) that it probably has no application to legal causes of action, although it was said by this court in the *Emerson Case,* 124 Wis. 369 (102 N. W. 329), at page 389, that "doubtless * * * the second clause of the statute applies more generally if not exclusively, to equitable suits."

There can be little doubt that the clause will find its most frequent application in equitable actions, but the code makers neither had nor expressed any intention to limit it in that way. The very wording of the introductory words of the clause precludes that idea: Causes of action "whether * * * legal or equitable or both" may be joined where they arise out of transactions connected with the same subject of action. They intended to give the court power to lay hold of, sift out, and determine in one action rights and wrongs between the same parties which has this element of unity, and they did not intend to limit this broad power in any way. It should be construed and administered by the courts with a view to most effectively and fully carry out its purpose so far as may be consistent with the orderly and prompt administration of justice and the preservation of the rights of litigants.

We have before us two causes of action—one by the owner of certain lands to prevent the further assertion of a wrongful claim of title to those lands, and another to recover for a wrongful entry on the same lands by the same person. Can they be joined? They do not arise out of the same transaction. One arises out of some oral or written claim, the other out of an actual physical entry on the land. Both of these are transactions under the rule heretofore given, but are they both connected with the same subject of action? Evidently we are obliged to define the words "*subject of action*" to reach an answer.

If we say that the subject of the action is the plaintiff's alleged right alone—i. e., his title—then could it be said logically that the physical trespass on the land was in any way connected with the subject? On the other hand, if we say that the subject of the action is the land alone and not the plaintiff's title thereto, could it be said logically that the false claim of title was connected with the subject? The questions suggest that either holding would be too narrow, and that with better reason it should be said in a case like the present that the subject of the action is composed both of the land and the plaintiff's alleged title taken together. Indeed, this seems the only logical holding. How can the title be disassociated from the land itself? The land must exist in order that there be any title, and both land and title must exist together if the plaintiff have any

standing in court or any right to ask for affirmative action by a court of justice in his behalf.

Now, if the subject of the action in cases like the present be the land and the plaintiff's title taken together, then any transaction which is connected with either the land or the title is connected with the subject of action, because the two are inseparable.

There are two reasons why in actions involving conflicting claims or interests in specific real or personal property the property itself must be considered as an essential part at least of the subject of the action: *First.* Because, if it be not so, then the code provisions before cited, which provide (1) that certain classes of actions shall be tried in the county where the subject of the action is situated; and (2) that the summons may be served by publication where the subject of the action is real or personal property in this state, become nonsense, because they can apply to nothing. *Second.* Because, when it is admitted that in using the words "*subject of action*" the code makers had in mind the idea of subject-matter as used before the code, it must also be admitted that the words cover the specific real estate in any action where conflicting claims to such real estate are in issue. "Subject-matter" as used before, the code when applied to such a case meant the real estate itself. *Burral v. Eames,* 5 Wis. 260.

But, if it were to be held that the words in question refer only to specific real and personal property, then they could not apply to the actions involving only rights and wrongs not connected with specific property, and as to these latter actions, comprising the great mass of ordinary litigation, there would either be no subject of action at all, or the subject of action would be something of entirely different nature. It seems that something like a uniform rule should be established if it be possible. The code makers were striving for uniformity as well as for simplicity. If some essential basic element can be found which inheres in all causes of action, local as well as transitory, real as well as personal, which, in actions involving specific property, can be joined with the specific property, both together forming the subject, and which in other actions can stand alone or in connection with the intangible thing involved, like the character in slander, and form the subject, it would seem that this might be said to solve the problem.

It seems to us that this basic and fundamental element is to be found in the plaintiff's *main primary right,* for the invasion of which the action is brought. Thus in controversies involving conflicting claims to specific real or personal property the property itself plus the right, title, interest, claim, or lien upon the property which the plaintiff alleges and which gives him his standing in court is to be considered as together forming the subject of the action and he may join to his first cause of action another based on a different transaction from the first, but which is connected with reasonable directness with either the property itself or with the plaintiff's title or interest therein alleged in the first cause of action. It seems to us that this solution of the questions harmonizes all of the code provisions which use the term, and that it also solves to a very large extent, if not completely, the difficulties found by Mr. Pomeroy, and which seem to have compelled him to disagree with himself. We think the principle will be found to be capable of satisfactory application to actions not involving property, but simply involving personal rights and wrongs. As said by Mr. Pomeroy at section 651: "The primary right, however, always exists, and is always the very central element of the controversy around which all the other elements are grouped and to which they are subordinate."

We therefore come to this conclusion: That in possessory and proprietary actions, whether involving real or personal property, the subject of action is composed of the plaintiff's primary right, together with the specific property itself. Further than this we do not go, except to say that as it seems to us the plaintiff's primary right, which is alleged to have been broken, must in all other actions be held to be an essential part, and perhaps in many cases the whole, of the *"subject of the action,"* as those words are used in the code.

It follows that the two causes of action before us are properly joined.

BY THE COURT. Order affirmed.

VINJE, J., took no part.

SECTION 2. EACH MUST AFFECT ALL THE PARTIES.

(a) In General.

KRUSCHKE v. QUATSOE.

Supreme Court of Colorado. 1910.

49 Colorado, 312.

Mr. Justice HILL delivered the opinion of the court:

The defendant in error, as plaintiff, filed his complaint in the district court of the city and county of Denver, making Isaac Kruschke and W. M. Jones defendants. The material part of the complaint, in substance, is that at La Plata county the plaintiff and Isaac Kruschke, one of said defendants, entered into a contract. Then follows a copy of the contract, which includes matters pertaining to pianos, certain schemes of advertisement, publication in newspapers, etc., in connection therewith; all to be performed at Durango, in La Plata county. Under certain conditions named, the defendant Kuschke agreed to pay to the plaintiff at the city of Lamar, Colo., the sum of $204. It was dated August 10, 1906, and purported to be signed at Durango, Colo.

The complainant further alleged that upon the 11th day of September, 1906, for value received from this plaintiff by said defendant W. M. Jones, he guaranteed and agreed to pay plaintiff the amount due or to become due upon said contract; said guaranty being in writing and upon the back of the Kruschke contract, as follows:

"9/11/06. For value received I hereby guarantee payment of within contract, when due, and I assume joint liability with the maker, I. Kruschke."

Performance of the contract by the plaintiff was alleged, and judgment prayed for the amount due.

The defendant W. M. Jones accepted service of the summons at Denver. The defendant Kruschke was served in La Plata county, and he thereafter filed his motion for a change of venue, and upon the same day filed a demurrer to the complaint. * * * The motion for change of venue was overruled. The demurrer was also overruled.

The defendant Kruschke elected to stand upon his motion and demurrer. Judgment was entered in favor of the plaintiff, and the action is here for review upon error.

The second and third grounds of demurrer were: "(2) That it appears on the face of said complaint that there is a misjoinder of parties defendant therein. (3) That it appears on the face of said complaint that there is a misjoinder of causes of action therein." The questions raised by the demurrer are decisive of the other. It will be noted that the guaranty was executed some time after the execution of the contract, and, so far as the pleadings disclose, had no connection with it and was for a separate consideration; hence the question is whether the original contract and the contract of guaranty constitute two separate and distinct contracts, to which there are different parties which and who cannot be joined in one action. There can be no question that at common law they were separate and distinct contracts; but it is urged that section 13 of our code is authority for this action, and counsel claim that the statement in the guaranty written on the contract, as follows: "I assume joint liability with the maker, I. Kruschke"—makes the defendant Jones liable upon the same instrument with the defendant Kruschke, as he thereby assumes joint liability. We cannot agree with this conclusion, nor do we think that section 13 of our code was intended to cover a case of this kind. Mr. Jones was not a party to this instrument, nor assignee of any one connected with it. So far as the pleadings disclose he was a stranger to the transaction. The contract between the plaintiff and the defendant Kruschke was complete upon the date of its delivery. It made no provisions for sureties or joint liability by others, and none were to be furnished or assumed. The contract between the plaintiff and the defendant Jones, executed one month later, was a separate contract. Its language implies this, for it says: "For value received I hereby guarantee payment of within contract, when due"—which refers to another contract from that which he was entering into. The fact that his contract is written upon the back of the other does not make it a part of the same obligation. A stranger to a contract cannot become a party to it without the consent of both parties, nor can he become a surety without such consent within the meaning of section 13 of our code, which, in this respect,

applies only to persons jointly or severally liable upon the same instrument, including parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, and not to the independent volunteer guarantor of the payment of the instrument executed by other parties. *Shropshire v. Smith et al.* (Tex. Civ. App.) 37 S. W. 470.

Cases pertaining to parties, including the indorsers of negotiable instruments, sureties furnished by the makers of contracts, the assignors thereof, etc., brought under our, or similar, code provisions, have no application to the facts here. It follows that the court erred in overruling the demurrer, as well as the motion to change the place of trial. Similar conclusions have, in substance, been approved in the following cases: *Mowery v. Mast,* 9 Neb. 445, *Harris v. Eldridge,* 5 Abb. N. C. (N. Y.) 278; *Barton v. Speis,* 5 Hun. (N. Y.) 60; *Stewart et al v. Glenn,* 5 Wis. 14; *Adams v. Wallace,* 119 Cal. 67, *Brewster v. Silence,* 8 N. Y. 207; *Shropshire v. Smith et al.* (Tex. Civ. App.) 37 S. W. 470.

The judgment is reversed, and the cause remanded, with directions to sustain the demurrer and grant the motion.

Reversed and remanded.

Chief Justice CAMPBELL and Mr. Justice MUSSER concur.

NAHTE v. HANSEN.

Supreme Court of Minnesota. 1908.

106 Minnesota, 365.

BROWN, J. Defendants interposed a demurrer to plaintiffs' complaint, and appealed from an order overruling it. It appears from the complaint that plaintiffs, four in number, severally own adjoining tracts of land which constitute their separated and distinct farms, in no part of which is there any joint title or interest. Defendants also, three in number, own separate tracts of land located in the immediate vicinity of that owned by plaintiffs and to rid their land of certain surplus water they, acting jointly, wrongfully and unlawfully constructed a ditch or drain therefrom, the result of which was to cast large quantities

of water upon the lands owned by plaintiffs, to the injury and damage of each in the sum of $100. The several plaintiffs joined in this action and demanded as relief that defendants be required to fill up the ditch, that they be perpetually enjoined from maintaining it in the future, and that each plaintiff have and recover the damages alleged in the complaint to have been suffered by him in consequence of the same. The demurrer was placed on the ground that several causes of action were improperly joined, viz., the cause of action for an abatement of the ditch and that for damages separately suffered by plaintiffs. The sole question for consideration is whether the complaint is open to this objection.

There is no question but that the facts stated in the complaint, if found to be true, entitle plaintiffs to an injunction restraining the maintenance of the ditch, and also to such damages as they separately suffered by reason of the unlawful acts of defendants. But plaintiffs have no joint or common interests in the damages sustained, and it is clear that their separate claims in that respect cannot be joined with the cause of action for the equitable relief, in which they do have a joint and common interest. This was affirmatively held in *Grant v. Schmidt,* 22 Minn. 1. The question did not there arise upon demurrer; but the rules of law applicable to such cases were laid down, and it controls the case at bar. The facts are substantially identical in the two cases, and to sustain plaintiff's contention that the damages claimed may be awarded as an incident to the equitable relief would in effect overrule that decision. This we are not disposed to do. The rule there announced is supported by the authorities generally (Wood on Nuisances, 1160; Bliss on Code Pleading, 76; *Brady v. Weeks,* 3 Barb. [N. Y.] 157; *Palmer v. Waddell,* 22 Kan. 352; *Grand Rapids Co. v. Bensley,* 75 Wis. 399, 44 N. W. 640; *Hawarden v. Coal Co.,* 111 Wis. 545, 87 N. W. 472, 55 L. R. A. 828), and is in accord with our statutes on the subject of the joinder of causes of action (section 4154, Rev. Laws 1905.) It is there provided, in effect, that different causes of action united in the same complaint must affect all the parties alike.

Counsel for plaintiffs call attention to *Gilbert v. Boak Fish Co.,* 86 Minn. 365, 90 N. W. 767, 58 L. R. A. 735, and urge that, because it was there held that the right to an

injunction abating a nuisance and damages for its maintenance up to the commencement of the action constitute but one cause of action, plaintiffs are bound to include their damages in this case or waive them. That case is not in point. The decision there made was based upon the general proposition that a judgment in an action is a bar to another suit as to all issues or questions which were or could have been litigated therein. It was accordingly held that the plaintiff's claim for damages for the nuisance there complained of, not only could, but should, have been made in the action to abate the nuisance. In the case at bar the damages claimed cannot, under the rule of the Schmidt case, be recovered in this action, and plaintiffs will not be barred from their right to maintain separate actions therefor.

It follows that the demurrer should have been sustained as to separate claims for damages of the several plaintiffs. *Anderson v. Bank*, 53 Minn. 191, 54 N. W. 1062. The complaint; however, states a joint cause of action for the abatement of the nuisance, and it may be amended by eliminating the claim for damages (*Brady v. Weeks*, 3 Barb. [N. Y.] 157), and the action proceed as one for the equitable relief prayed for.

Order reversed.

(b) Must Affect All in Same Capacity.

MERRILL v. SUFFA.

Supreme Court of Colorado. 1908.

42 Colorado, 195.

Mr. Justice CAMPBELL delivered the opinion of the court:

Action in mandamus. The petition for the writ designates the parties as petitioner and respondent respectively. Where, as here, the writ is invoked for the protection of the purely private right of the applicant, the proceedings may be conducted in the names of the real parties in interest, and therefore with equal propriety they might be called plaintiff and defendant, mandamus being, under our code, regarded as a civil action. *Stoddard v. Benton*, 6 Colo. 508; *Orman v. People*, 18 Colo. App. 302.

The petitioner, a stockholder in each of eight separate and independent corporations, having, after due demand, been deprived, as he says, of his statutory right to inspect the stock books and other books and papers of these different corporations by the secretary thereof, who is one and the same individual, the respondent herein filed this petition to compel respondent, as secretary of each company, to give him access to such books and papers with the privilege of making and carrying away extracts therefrom.

To the alternative writ which was issued upon filing the petition, respondent demurred upon a number of distinct grounds, two of which are: (1) A misjoinder of parties respondent; (2) an improper union of several causes of action.

* * * * * * * * * * *

The misjoinders complained of are said to consist in the facts that each of the separate corporations is a distinct legal entity, neither one of which, nor its secretary, has any connection whatever with any other corporation or its secretary, nor any interest in this application, so far as concerns any of the other corporations, or its secretary; and that, if petitioner has an action against respondent in his official capacity as secretary of any of these corporations, the action is founded upon a tort entirely distinct from the tort committed by him as secretary of either of the others, and, as secretary of one, he has no interest in any manner affecting him in his capacity of secretary of any of the other corporations; and the tort, if any, which he has committed as secretary of one, was in a representative capacity which is not the same as, but different from, the capacity in which he acts as secretary of the others.

We think this contention of respondent is sound.

* * *

In order to enforce the right of inspection here demanded, it is not necessary to make the corporation a party respondent, but merely its officer upon whom the statutory duty is devolved. Yet even though respondent, at the same time and by the same act, committed a wrong upon the same person (the petitioner) by refusing, as secretary of the eight distinct corporations, the inspection demanded, the same act constituted eight separate and distinct torts.

The denial of the right of inspection in each case, in his capacity as secretary, constituted a single wrong by respondent, a violation of a duty imposed by statute, eight wrongs in all, and gave rise to eight separate rights and causes of action in petitioner's favor. Some torts are in their nature several, not joint—as slander. As secretary of one of these corporations, respondent could not, in the nature of things, be guilty of a tort which, as secretary of another, he committed against petitioner in refusing access to its books. The torts are of the same kind, but committed by different persons or the same individual acting in different capacities. Doubtless, petitioner would be the first to admit this if he were suing for the penalty the statute gives for a wrongful refusal. In their nature they were several, and not joint torts, and could not be joined in one action. The respondent is not sued in his individual but in his official or representative capacity. Each of the eight corporations is a distinct and separate legal entity. True, the same individual (Merrill), who is secretary of one, is the secretary of each of the others, but his representative capacity as secretary of one is a different capacity from that in which he is secretary of the others, and is just as distinct as is that of the corporate entities themselves. So that when he is sued, as here, as secretary of each of eight distinct corporations, he is sued in eight different representative capacities, just as if the action was brought against eight different individual secretaries.

* * * * * * * * * * *

Section 70, Mill's Ann. Code, relates to the joinder of causes of action, but does not permit of such a joinder as was attempted here. That section expressly, *inter alia*, says that, in no event, shall causes of action be joined unless they affect all the parties, and affect them in the same character and capacity. A joinder of causes of action, such as is here attempted, is just as improper as would be in one action the union of eight distinct causes of action, based upon eight distinct wrongs which, as executor of eight separate and distinct estates, respondent had committed against petitioner. We have been cited to no authorities, and have found none, sustaining such joinder of causes of action, or of parties respondent.

The point made by petitioner that a motion, and not a demurrer, is the remedy for a misjoinder of causes of action is not good. Where several distinct causes of action which might be properly joined have been commingled in one statement, a motion is the proper remedy to compel a separate statement; but where the objection is that the causes of action cannot be joined at all, demurrer is the appropriate remedy when the defect, as here, appears on the face of the complaint. Code Civ. Proc. § 50 (Mills' Ann. Code;) *Ludington v. Heilman,* 9 Colo. App. 548; Id., 26 Colo. 326.

The joinder of causes of action being unauthorized, it would seem necessarily to follow that there was an improper misjoinder of parties respondent—that is, a misjoinder in suing one individual in several different representative capacities. The following are in point: *Dubois v. Bowles,* 30 Colo. 44; *Faust v. Smith,* 3 Colo. App. 505; *State ex rel. v. Commissioners,* 38 Kan. 317; *Co. Comm'rs. v. King,* 13 Fla. 451, 470; *Haskins v. Board of Supervisors,* 51 Miss. 406; *Rex. v. Mayor,* 11 Mod. 382; 6 Bacon's abridgement, title "Mandamus," 421; Merrill on Mandamus, §§ 232, 234a; Pomeroy's Rem. & Rem. Rights, §§ 281, 307, 313, 442-451, 502; *A. T. & S. F. R. R. Co. v. Comm'rs Sumner Co.,* 51 Kan. 617; *Kennedy v. Stallworth,* 18 Ala. 263; *Mermer v. Jenkins,* 61 Cal. 151; *Mertens v. Loewenberg,* 69 Mo. 208; *Viall v. Mott,* 37 Barb. 208; *Nat. Bank v. Valenta,* 33 Tex. Civ. App. 108.

The judgment must be reversed, and the cause remanded, and it is so ordered.

Reversed.[1]

Chief Justice STEELE and Mr. Justice GABBERT concur.

[1] In Carrier v. Bernstein (1898), 104 Iowa 572, plaintiff sued on one count as a wife for statutory damages caused by defendant selling intoxicating liquor to her husband, and on another count as a citizen of the county and informer under a statute permitting such informer to receive half the statutory penalty imposed on defendant for selling intoxicating liquors to an intoxicated person, and it was held that such counts could not be joined because not brought by plaintiff in the same right.

Although the statutes on which the cases of Merrill v. Suffa (*supra*, in the text), and Carrier v. Bernstein (*supra*), expressly require that the action shall be by or against the same parties in the same capacity, the same rule is adhered to in jurisdictions where no such express provisions is found. Brown v. Utopia Land Co. (1907), 118 N. Y. App. Div. 367; Crowley v. Hicks (1898), 98 Wis. 566; Cincinnati, Hamilton & Dayton R. R. Co. v. Chester (1877), 57 Ind. 297; Perkins v. Slocum (1894), 82 Hun (N. Y.), 366; Schlicher v. Hemenway (1896), 110 Cal. 579; Fleischman v. Shoemaker (1887), 2 Ohio C. C. 152.

Contra: Fish v. Berkey (1865), 10 Minn. 199.

(c) Need not Affect them All Equally.

FEGELSON v. NIAGARA INSURANCE COMPANY.

Supreme Court of Minnesota. 1905.

94 Minnesota, 486.

START, C. J.: The plaintiff brought this action against six fire insurance companies to recover on six separate policies of insurance covering his stock of merchandise, furniture, and fixtures, each company issuing one policy. The complaint alleges, in effect, that each of the defendants is a foreign corporation doing a fire insurance business in this state; that at the time of the issuing of each of the policies and until the loss thereunder the plaintiff was engaged in business in the city of St. Paul, and owned a stock of merchandise and store furniture and fixtures; that before February 24, 1904, each of the defendants issued to the plaintiff its policy of insurance, whereby it insured the plaintiff against loss or damage by fire of his merchandise, furniture, and fixtures for the time and to the amount stated in its policy; each of the policies was of the Minnesota standard form required by Laws 1895, p. 417, c. 175, § 53, and by its terms allowed concurrent insurance without limit; that while all of the policies were in force, and on February 24, 1904, the property insured by the policies was in part destroyed and injured by fire, the total loss and damage being the sum of $6,366.25; that the plaintiff made due proof of his loss under each policy, but each of the defendants refused to pay any part of the loss, and claims that it is not liable upon its policy therefor; and, further, that the amount of the liability of each defendant for such loss depends upon the liability of the other defendants, and that to adjust the respective liabilities of the defendants it is necessary at the same time to determine the liability of each, and for this reason, and to prevent a multiplicity of suits, it is necessary to join all of the defendants in this action. The prayer of the complaint is that the court will ascertain the facts and the amount of the plaintiff's loss, and the proportionate share thereof of each defendant, and award judgment accordingly.

Two of the defendants answered the complaint, but the other four severally demurred to it on the ground that it does not state facts sufficient to constitute a cause of action, and that several causes of action are improperly united. The defendants appealed from an order of the court overruling their demurrer. It is here conceded by them that the case of *Kelly v. Ins. Co.* (Minn.) 102 N. W. 380, is decisive against them of the question raised by their first ground of demurrer. The complaint states facts constituting a cause of action.

The sole question, then, for our decision is whether several causes of action are improperly united in the complaint. Each of the policies contained the following provision, namely:

"If there shall be any other insurance on the property insured, whether prior or subsequent, the insured shall recover on this policy no greater premium of loss except in case of total loss on buildings sustained than the sum hereby insured bears to the whole amount insured therein."

"It may be conceded that this pro rata liability provision does not make the liability of the respective companies a joint one, and that the liability of each is several, to be determined by terms of its own contract. *Bardwell v. Ins. Co.*, 118 Mass. 465; *Insurance Company v. Brown*, 77 Md. 64, 25 Atl. 989, 27 Atl. 314, 39 Am. St. Rep. 386. This, however, is not determinative of the question whether several causes of action are improperly united in the complaint for separate causes of action may be so united in exceptional cases. Does this pro rata provision, which is common to all of the policies, bring this case within any well-recognized exception to the general rule that several causes of action to enforce the separate liability of several defendants cannot be joined in the same complaint? We are of the opinion that the question must be answered in the affirmative. The pro rata provision limits the liability of each insurer to the proportion of the loss which the amount of insurance named in its policy bears to the aggregated amount of insurance named in all of the enforceable policies on the property. We say "enforceable policies" advisedly, for the provision under consideration specifically makes "the whole amount insured" one of the essential factors in determining the liability of each insurer on its policy. This necessarily implies valid or en-

forceable insurance, not simply insurance in form, whether valid or not. It follows that the several policies set out in the complaint are not wholly independent of each other, for they are so far correlated that by the express stipulation of each the extent of the liability assumed in each is to be measured by the total amount insured by all of them.

It is necessary, then, in order to determine the amount which the plaintiff is entitled to recover against each of the defendants herein, to conclusively determine as against each two questions in which there is a community of interest among all of the defendants, namely, the amount of the plaintiff's loss and the amount of his valid insurance upon the property lost or damaged by fire. When these essential and precedent questions are determined, the ascertainment of the amount of the liability of each defendant is simply a matter of mathematics, for the liability or nonliability of each defendant on its policy is necessarily conclusively determined when the total amount of the valid insurance is established. A verdict or decision on the question as to the amount of the loss and the total amount of the insurance necessarily affects and binds all parties to the action, and they have a community of interest therein. Now, if the plaintiff cannot bring all of the defendants into one action, and have these questions determined as a basis for accurately and conclusively ascertaining the pro rata liability of each insurer for his loss, he is without any certain, speedy, adequate, and convenient remedy in the premises, and he is remitted to the uncertain remedy of a multiplicity of suits. If a separate action against each defendant be his only remedy, he must bring six actions, instead of one, in each of which the same evidence on the two essential questions must be gone over, and the law applicable thereto determined, with the not improbable result that the amount of his loss and the amount of his valid insurance will be fixed at a different amount in each case. Such a remedy is neither certain nor adequate, depending as it does upon the aggregate result of a multiplicity of vexatious actions.

It is clear upon principle and authority that equity has undoubted jurisdiction to prevent the necessity for such a multiplicity of actions and to afford the plaintiff a certain and adequate remedy. "Courts of the highest standing and ability have repeatedly interfered and exercised

this jurisdiction, where the individual claims were not only legally separate, but were separate in time, and each arose from an entirely separate and distinct transaction, simply because there was a community of interest among all the claimants in the question at issue and in the remedy." 1 Pomeroy's Equity Jurisprudence, § 269; *City of Albert Lea v. Nielson,* 83 Minn. 246-251, 86 N. W. 83; *Pretzfelder v. Ins. Co.,* 116 N. C. 491, 21 S. E. 302; *Virginia Chemical Co. v. Ins. Co.,* 113 Fed. 1, 51 C. C. A. 21; *Tisdale v. Ins. Co.* (Miss.) 36 South. 568.

It is true that the issue tendered by the answers of the several defendants may not be identical, but such contingency does not affect the equitable jurisdiction of the court to bring all of the defendants into one action for the determination of the essential questions in which all of them have a community of interest, and thereby prevent a multiplicity of suits. Having jurisdiction, the court will grant full relief. The court has ample power to protect the interests of all the parties. It is difficult to suggest any good reason why the procedure adopted by the plaintiff in this case should not be sustained. We hold that several causes of action are not improperly united in the complaint, and that the order overruling the demurrer was correct.

Order affirmed.

SECTION 3. MUST NOT REQUIRE DIFFERENT PLACES OF TRIAL.

WILSON v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Court of Appeals of Kentucky. 1908.

112 Southwestern, 585.

CLAY, C.: Appellant, E. Wilson, who then resided at Afton, Ind. T., contracted with the Frisco Line at that point to transport a car load of household goods and live stock from Afton to Rice's Station, in Estill county, Ky. By the terms of the contract he had the privilege of riding in the car or on the train carrying the car from Afton to his

destination. The car was delivered to appellee, Louisville & Nashville Railroad Company, at St. Louis, and was transported by it from that point to Richmond, Ky. There it was delivered to the Louisville & Atlantic Railroad Company, to be taken to Rice's Station, in Estill county. After reaching Kentucky, appellant brought this action in the Madison Circuit Court against the Louisville & Nashville Railroad Company and the Louisville & Atlantic Railroad Company. In the first paragraph of his petition appellant asked for the recovery of $36.80, which he alleged the Louisville & Atlantic Railroad Company wrongfully required him to pay as additional freight on the shipment. In the first clause of the second paragraph of the petition appellant asked damages on the ground that while the car containing the goods and live stock was on the side track in St. Louis the Louisville & Nashville Railroad Company carelessly and negligently ran one of its engines, or a portion of its train, against the car with such violence as to break and damage the goods contained therein to the extent of $50. In the second clause of the second paragraph appellant asked damages in the sum of $500 for personal injuries sustained by him in the same collision in which his goods were damaged. In the third paragraph of the petition appellant asked damages in the sum of $50 on account of delay to his shipment at Richmond. Appellee, Louisville & Nashville Railroad Company, filed an answer in the nature of a plea to the jurisdiction of the Madison Circuit Court as to each of the causes of action set forth in the petition. The lower court adjudged that it had jurisdiction of appellee as to the cause of action for $50 damages for injury to the household goods, and also as to the cause of action for the delay at Richmond, asserted in the third paragraph of the petition. It further adjudged that it had not jurisdiction of appellee as to the cause of action for $500 damages on account of personal injuries, asserted in the second paragraph of the petition. Appellant's petition as to the last-named cause of action was dismissed for want of jurisdiction, and from this judgment the present appeal is prosecuted.

It is the contention of appellant that his cause of action, both for the injury to himself and his property, arises entirely out of the contract of shipment; that the injury which he received, both to himself and to his property, was

the result of one wrongful act; that the law does not contemplate that such an action, arising from one wrongful act, shall be split up, and one part of the damages sued for in one jurisdiction and the other part sued for in another jurisdiction. Appellant further contends that, under subdivisions 1 and 6 of section 83 of the civil code of practice, express authority is given to join actions arising from contracts or for injuries to persons and property. For the purpose of discussing the question, we give below the provisions of the code relative to the point involved:

"Sec. 73. Excepting the actions mentioned in section 75, an action against a common carrier, whether a corporation or not, upon a contract to carry property, must be brought in the county in which the defendant, or either of several defendants, resides; or in which the contract is made; or in which the carrier agrees to deliver the property. An action against such carrier for an injury to a passenger, or to other person or his property, must be brought in the county in which the defendant, or either of several defendants, resides; or in which the plaintiff or his property is injured; or in which he resides, if he reside in a county in which the carrier passes."

"Sec. 83. Several causes of action may be united, if each affect all the parties to the action, may be brought in the same county, and may be prosecuted by the same kind of action; and if all of them be brought—1. Upon contracts, express or implied; or * * * 6. For injuries to person and property."

The first part of section 73 fixes the venue of the action against the common carrier upon a contract to carry property. Such an action may be brought at the residence of the defendant, in the county where the contract is made, or the county in which the carrier agrees to deliver the property. In this case the Louisville & Nashville Railroad Company agreed to deliver the property at Richmond, Madison county, Ky. Therefore it was proper to bring an action growing out of the contract of shipment in the Madison Circuit Court. But the latter part of section 73 expressly provides that an action for an injury to a passenger, "or to other person or his property, must be brought in the county in which the defendant, or either of several defendants, resides; or in which the plaintiff or his property is injured; or in which he resides, if he reside in a

county in which the carrier passes." By the latter provision no authority is given to bring an action for an injury to a passenger in the county where the carrier agrees to deliver the property. On this account section 83 does not remedy the matter, for under that section one of the conditions precedent to uniting several causes of action is that each may be brought in the same county. No authority being given to bring the action for injury to a passenger in the county where the carrier agrees to deliver the property, it necessarily follows that the two causes of action cannot be brought in the same jurisdiction.

It appears from the record that appellant's residence is in Estill county, Ky.; that appellee's residence in is Louisville, Ky. Madison county, therefore, is the residence of neither appellee nor appellant. The Madison Circuit Court had jurisdiction of the claims for damages relating to the household goods, because the action was instituted in the county where appellee agreed to deliver the property. The code does not authorize the bringing of a suit in such county for an injury to a passenger. We therefore conclude that the judgment of the trial court in so holding was proper.

Judgment affirmed.

SECTION 4. EACH MUST BE SEPARATELY STATED.

HALL v. CUDAHY.

Supreme Court of Colorado. 1909.

46 Colorado, 324.

Mr. Justice CAMPBELL delivered the opinion of the court:

This action, to enforce a mechanic's lien upon a mine, is against Isaac Hall, the owner, and S. D. Hanna, who, it is alleged, had a contract with the owner for its purchase.

The complaint unquestionably contains two well pleaded separate and distinct causes of action blended in one statement. * * *

The defendant owner, Hall, for himself alone, filed a motion to the complaint, which, among other things, asked

that these two causes of action be separately stated. This motion was overruled, and Hall by special demurrer raised the same questions, which was also overruled, and he then answered. * * * Defendant Hall brings the case here by appeal.

There can be no doubt that the motion is well taken. Subdivision 3, § 70, of our civil code provides that where two or more distinct causes of action are united in the same complaint, "it shall be necessary to state separately in the complaint the different causes for which the action is brought." This is an imperative requirement. When this provision is violated, the court has no discretion in the matter, but must, when a motion therefor is made in apt time, order them to be separately stated; and, if plaintiff fails to comply with the order, his complaint should be stricken from the files. In some states it has been held that a special demurrer is an appropriate remedy, but the rule which prevails in this jurisdiction requires the objection to be taken by motion. Code, § 60; *Cramer v. Oppenstein,* 16 Colo. 504; *Orman et al v. Mannix,* 17 Colo. 564; Bliss on Code Pleading (3d Ed.) §§ 119, 120; Pomeroy's Remedies and Remedial Rights, §§ 447, 450, 575; 14 Enc. Pleading & Practice, pp. 73 *et seq.,* 79; 6 Enc. Pl. & Pr. pp. 246, 272, *et seq.*

From the foregoing it will be seen that the question for decision here is not whether the complaint is ambiguous or uncertain, or whether two causes of action have been properly united. The latter question, under code, § 50, must be raised by special demurrer, and is waived by answer. The former is also raised by demurrer, and, it seems a motion under sections 60 and 75 is a concurrent remedy. *Orman v. Mannix, supra;* 6 Enc. Pl. & Pr. p. 273. It has also been held that a motion to require a complaint to be made more specific or definite is addressed to the sound legal discretion of the trial court, and its ruling thereon will not be reversed unless the discretion has been abused. 6 Enc. Pl. & Pr. p. 280; *McDuffie v. Bentley,* 27 Neb. 380; *Cathcart v. Peck,* 11 Minn. 45 (Gil. 24). And generally motions directed to such defects are waived by pleading over. 31 Cyc. 752.

Under the mandatory requirement of section 70, subd. 3, of our code that different causes of action which are not up in the same complaint must be separately stated therein,

though some authorities do not regard the vice as serious *Possell v. Smith*, 39 Colo. 127, it would seem that, when it has once been ascertained that two or more causes of action are thus pleaded, and certainly where, as here, they are inconsistent, the court has no discretion when the objection is made in apt time, but must require them to be separately stated. If, however, it is a discretionary matter, it is clear that, when it clearly appears that two or more such causes of action as we have here are intermingled in one count of the complaint, to refuse the seasonable request of the defendant to have them separately stated works to defendant's prejudice, and is an abuse of discretion for which a reversal will lie. The reasons for such a holding are obvious. The defendant is entitled to have different causes of action separately stated, not only that he may determine for himself whether or not they are such as may be properly united in the same complaint, but also whether, when separately stated, any of them is subject to a motion or to a demurrer upon any other ground. Whatever the code provisions may be as to what causes of action may be united in one complaint, it is uniformly held that they must be separately stated, and in some states the statements must be numbered. The latter requirement is not in our code. Bliss on Code Pleading (3d Ed.) §§ 119, 120.

In the case before us, as already said, there is not the slightest doubt that two distinct causes of action have been intermingled in one statement of the complaint. We are not now concerned with the question whether they are such as may be properly united, if separately stated. It is the undoubted right of defendant to have them separately stated, for the reasons already given. * * * A case directly in point is *B. & L. Association, etc. v. Cameron*, 48 Neb. 124. Section 93 of the Nebraska code of civil procedure provides, "where the petition contains more than one cause of action, each shall be separately stated and numbered." the complaint there contained two separate causes of action. The defendant objected at every stage of the proceeding that they were not separately stated, but the district court refused to compel the plaintiff so to state them. The defendant then answered, and judgment went against him, and he prosecuted error. The Supreme Court thus stated its conclusion: "It follows that the district court should have required the plaintiff to separately state and

number his causes of action, and its ruling in that behalf is error calling for a reversal of the judgment." See, also, *Baltzell v. Nosler*, 1 Iowa, 588, 63 Am. Dec. 466.

Other questions, some of them important and serious, have been discussed by counsel; but we do not find it necessary to consider them. Because of the court's refusal to require the two causes of action to be separately stated in the complaint, the judgment must be reversed and the cause remanded.

Reversed and remanded.[1]

Chief Justice STEELE and Mr. Justice MUSSER concur.

[1] *Contra:* Refusal to sustain motion is not reversible error unless it appears to have actually prejudiced the moving party. Spillman v. Union Portland Cement Co. (1910), 81 Kan. 775.

MURRAY v. CITY OF BUTTE.

Supreme Court of Montana. 1906.

35 Montana, 161.

This action was commenced in the district court of Silver Bow county by Dr. T. J. Murray to recover damages from the city of Butte. The complaint attempts to state two causes of action. In the first it is alleged that the plaintiff is the owner of lot 12, block 11, original townsite of Butte; that the city, without right, has constructed and maintained a storm sewer over and across lot 12 for drainage, sewage, and other purposes for which storm sewers are generally used; that the said sewer was permitted by the city to become and remain in an unsafe and unsanitary condition; that the material out of which the sewer was constructed were placed in such a loose and temporary manner that cracks and other openings existed, through which nauseous gases and steam escaped from the sewer; * * * that the plaintiff petitioned the city council to repair the sewer so as to avoid the defects mentioned, but plaintiff's petitions were placed on file and nothing further done in the premises; * * * and by reason of the city's failure to do so it became necessary for the plaintiff to re-

pair the sewer, which he did at an expense of $922.98, which sum, it is alleged, was the reasonable value of the work done. It is further alleged that a claim for this amount was presented to the city council, but disallowed, except in the sum of $125 as a full settlement, which sum was not accepted, and no part of this claim has ever been paid. For a second cause of action the plaintiff refers to the first 13 paragraphs of his first cause of action, and seeks to make them a part of his second cause of action by this reference. The plaintiff then alleges that the existence of said storm sewer through his premises is a permanent injury to his property, and by reason of the facts stated his property has been damaged in the sum of $3,000. He alleges that he presented a claim for this amount to the city council, which was disallowed, and no part of this claim has ever been paid.

* * * * * * * * * * *

Mr. Justice HOLLOWAY delivered the opinion of the court.

* * * * * * * * * * *

3. In his second count or cause of action the plaintiff seeks to recover damages for injury to his property caused by the maintenance of a nuisance. Does the complaint in the second count state facts sufficient to constitute a cause of action? The only averment in this count, aside from the statement that a claim for the damages was presented to the city council and not allowed, is that contained in paragraph 2 of the second count, as follows: "(2) Plaintiff further alleges that the existence of said storm sewer through and over plaintiff's property, and through and under the said building, is a permanent injury to plaintiff's property, by reason of the facts hereinbefore alleged, and plaintiff was and is damaged by reason thereof in the sum of $3,000." Standing alone, confessedly, the allegations of this paragraph did not state any cause of action whatever. But in paragraph 1 it is sought to make all the allegations contained in the first 13 paragraphs of the first cause of action a part of the second cause of action merely by this reference. This cannot be done. *McKay v. McDougal,* 19 Mont. 488, 48 Pac. 988; *Hefferlin v. Karlman,* 29 Mont. 139, 74 Pac. 201.

It is a general rule of pleading that every cause of action must be complete in itself. It must contain all the material and issuable facts which constitute the cause of action em-

braced in it, and its defects cannot be supplied from another cause of action. Bliss on Code Pleading, § 121; Pomeroy, Code Remedies, § 575. This rule, however, is generally held not to extend to include matter which is merely introductory or by way of inducement, as, for instance, the description of property, or the particular character in which plaintiff and defendant are parties; nor will it be extended to require a repetition of exhibits, if proper references be made in these several instances.

* * * * * * * * * *

As was said by this court in *Hamilton v. Nelson,* 22 Mont. 539, 57 Pac. 146: "The statement of each cause of action is practically a complaint in itself. No interdependence exists; but each cause is in all respects as independent of the other as if it were the sole matter in the complaint." * * *

* * * The cause is remanded to the district court, with directions to dismiss plaintiff's alleged second cause of action.[1] * * *

Mr. Chief Justice BRANTLY and Mr. Justice SMITH concur.

[1] *Accord:* Graves v. St. Louis, M. & S. E. Ry. Co. (1908), 133 Mo. App. 91; Gardner v. McWilliams (1902), 42 Ore. 14.

Contra: May incorporate by reference. Ramsey v. Johnson (1897), 7 Wyo. 392; Marietta v. Cleveland, C., C. & St. L. Ry. Co. (1906), 52 Misc. (N. Y.), 16; Realty Revenue etc. Co. v. Farm etc. Co. (1900), 79 Minn. 465.

In Treweek v. Howard (1895), 105 Cal. 434, this form of incorporation by reference was approved: "The plaintiff here repeats and alleges all the matters and things set forth and alleged in the subdivisions of this second amended complaint, numbered 1, 2, 3, 4, and prays that the same be taken and deemed a part of this cause of action the same as though herein set out at length."

SECTION 5. STATING SAME CAUSE OF ACTION IN DIFFERENT FORMS.

HARVEY v. SOUTHERN PACIFIC COMPANY.

Supreme Court of Oregon. 1905.

46 Oregon, 505.

Mr. Chief Justice WOLVERTON delivered the opinion:

The first question presented for our determination is one of practice, and arises upon the trial court's allowance of the motion requiring the plaintiff to elect as to which cause of action he would proceed upon at the trial. The complaint, we think, may appropriately be characterized as containing a duplicate statement of distinct grounds of recovery for the same right of action; the right arising from the single transaction in killing plaintiff's animal. The defendant is charged, however, with two culpatory acts in the invasion of plaintiff's right—one for a common-law negligence, and the other for failure to fence, a duty imposed upon it by statute—for either one of which plaintiff is accorded a right of action, but the relief is different. Upon the ground first named, the measure of relief is the value of the animal lost, but upon the other it is the value of the animal, enhanced by reasonable attorney's fees for the prosecution of the action (section 5146, B. & C. Comp.), so that there are stated in the complaint two grounds of recovery for the same right; affording the plaintiff different reliefs, according to the cause maintained. He could not have two judgments, however, and a judgment in the one form would preclude a judgment in the other, as the law does not allow double damages for the invasion of the same right. For joining the two grounds or causes of action in the same count, the defendant had its motion before answer to strike out the complaint because they were not separately stated. B. & C. Comp. § 81. By pleading over the right to interpose such a motion was waived.

There is, however, another exigency to which this motion does not extend. If there be duplicate statements of the same cause of action, or statements of different grounds of recovery for the same right, the defendant is entitled, un-

less in exceptional cases, to have the plaintiff elect upon which ground or cause he will proceed to trial, and the motion directed to that purpose may be interposed at any time before the trial. Mr. Pomeroy states the rule as follows: "Since the reformed pleading requires the facts to be averred as they actually took place, it does not, in general, permit a single cause of action to be set forth in two or more different forms or counts, as was the familiar practice at the common law. The rule is undoubtedly settled that, under all ordinary circumstances, the plaintiff who has but one cause of action will not be suffered to spread it upon the record in differing shapes and modes, as though he possessed two or more distinct demands; and, when he does so without special and sufficient reason, he will be compelled, either by a motion before the trial, or by an application and direction at the trial, to select one of these counts, and to abandon the others." Pomeroy, Code Rem. (4th Ed.) §§ 467, *576. Mr. Phillips says: "It may safely be said that the true rule, resting upon principle, and supported by the weight of authority, now is that where a plaintiff has a single right of recovery, that may rest upon one ground or upon another, according to the facts to be shown by the evidence, and he cannot safely foretell the precise nature and limits of the defendant's liability, to be developed upon the trial, he may state his right of action variously, in separate causes of action. This privilege is an exception to the general rule that each separate statement should set out a distinct and independent right of action, and inasmuch as a plurality of statements multiplies the issues, and tends to obscure the real claim which the defendant will have to meet, it is to be indulged only where it is fairly necessary for the protection of the plaintiff, and where it will not mislead or embarrass the defendant in his defense." Phillips, Code Pleading, § 207. See, also, *Spaulding v. Saltiel,* 18 Colo. 86, 31 Pac. 486; *Cramer v. Oppenstein,* 16 Colo. 504, 27 Pac. 716; *Brown v. Kansas City, etc. Ry. Co.,* 20 Mo. App. 429; *Otis v. Mechanics' Bank,* 35 Mo. 128; *Cartin v. Railroad Company,* 43 S. C. 221, 20 S. E. 979, 49 Am. St. Rep. 829.

The rule is well illustrated by a case from California. The complaint was filed, containing two counts—one for services performed on a promise to pay therefor a definite sum, and the other for the same services at their reasonable

worth—and, upon a motion to require plaintiff to elect, the Supreme Court, sustaining the ruling of the trial court, said that the plaintiff may set out the facts "in two separate forms when there is a fair and reasonable doubt of his ability to safely plead them in one mode only." *Wilson v. Smith,* 61 Cal. 209, 210. So, in Wisconsin, *Whitney v. Chicago, etc. Ry. Co.,* 27 Wis. 327, where the court for a like reason held it to be allowable for the plaintiff to charge the defendant on separate grounds in the capacity of a carrier and a warehouseman. So it was in *Bishop v. Chicago & Northwestern R. Co.,* 67 Wis. 610, 616, 31 N. W. 219, the court saying: " 'Since it is no longer necessary in order to protect the rights of the plaintiff, that he should set forth in different counts the same cause of action—variances between the allegations and the proofs being disregarded unless they actually mislead the adverse party to his prejudice upon the merits—the practice of so doing is disapproved of, because it is not in harmony with the spirit of the code.' An exception to this method of pleading is recognized by this court in a case when the plaintiff cannot know beforehand the precise nature and limits of the defendant's liability to him, and in such case it is permissible to allow the plaintiff to state his cause of action differently in different counts." * * *

The practice, however, of allowing or disallowing a motion of the kind, is a matter largely within the sound discretion of the trial court. *Manders v. Craft,* 3 Colo. App. 236; *Carlton v. Pierce,* 1 Allen, 26; *Hawley v. Wilkinson,* 18 Minn. 525 (Gil. 468); *Plummer v. Mold,* 22 Minn. 15; *Wagner v. Nagel,* 33 Minn. 348, 23 N. W. 308; *Kerr v. Hays,* 35 N. Y. 331.

* * * * * * * * * * *

These considerations affirm the judgment of the trial court, and it is so ordered.[1]

[1] *Accord:* Cripple Creek Mining Co. v. Brabant (1906), 37 Colo. 423; Spottswood v. Morris (1904), 10 Idaho, 129; Whitney v. Chicago & Northwestern Ry. Co. (1870), 27 Wis. 327; Astin v. Chicago, Mil. & St. P. Ry. Co. (1910), 143 Wis. 477; Waechter v. St. Louis & M. R. R. R. Co. (1905), 113 Mo. App. 270; Holm v. Chicago, Milwaukee & Puget Sound Ry. Co. (1910), 59 Wash. 293; Darknell v. Coeur D'Alene & St. Joe Transp. Co. (1910), 18 Idaho, 61; Ross v. Carr (1909), 15 New Mex. 17; Neuman v. Grant (1907), 36 Mont. 77; Willard v. Carrigan (1902), 8 Ariz. 70. Compare Gabrielson v. Hague Box & Lumber Co. (1907), 55 Wash. 342.

The matter is one largely within the discretion of the court. Neuman v. Grant (1907), 36 Mont. 77; Manders v. Craft (1893), 3 Colo. App. 236; Possell v. Smith (1907), 39 Colo. 127.

ASTIN v. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

Supreme Court of Wisconsin. 1910.

143 Wisconsin, 477.

MARSHALL, J.: If a person, owing a duty to another respecting that other's personal safety, violates it, inflicting upon such other corporeal injury, under such circumstances that it is difficult for him, by the aid of professional advice to satisfactorily determine whether the violation was characterized by what is known as gross negligence, or by the milder type of wrong denominated ordinary negligence —may such person have the wrong, whatever be its nature, redressed in a single action to recover for his injury, pleading in one cause of action liability on the ground of gross negligence and in a second on the ground of ordinary negligence? That is the broad question raised by the appeal.

* * * * * * * * * * *

* * * There are three degrees of negligence, viz., slight, ordinary and gross. The first is "an absence of that degree of care and vigilance which persons of extraordinary prudence and foresight are accustomed to use." It has the element of inadvertence but damaging results for failure to abstain therefrom are *damnum absque injuria*, while the party injured, and so failing and thereby contributing in a remote degree to his injury, is not precluded by that alone from obtaining judicial redress.

In the second degree of negligence, as its name signifies, there is inadvertence, in that the guilty party in the particular situation, fails to exercise such case as the great mass of mankind ordinarily exercise under the same or similar circumstances. * * *

The third degree of negligence is gross negligence, so-called. It has for its name somewhat of a misnomer, in that the fault is not characterized by inadvertence, in the lexical sense, at all. As in the first and second degrees such element must be present and dominant, in the third it must be absent. The wrong is characterized by an absence of any care on the part of a person having a duty to perform to avoid inflicting an injury to the personal or property rights of another, by recklessly or wantonly acting or

failing to act to avoid doing such injury, evincing such an utter disregard of consequences as to suggest some degree of intent, to cause such injury. Various terms have been used to characterize the mental state of the wrongdoer in such a case, as rashly, recklessly, willfully, wantonly, and even intentionally. Early it was said that such state involves such disregard of consequences as to evince little short of actual intent, that the latter and the other conditions, so run together, that no attempt in administration should be made to separate them as regards legal consequences of a compensatory nature.

So the court long since came to treat the third degree of wrong in all its phases as raising such a strong inference of malice as to be regardable as either actually or constructively intentional and to make no difference which, so far as relates to defenses and to recovery of compensatory damages.

* * * * * * * * * * *

It follows from the situation stated, that a cause of action sounding in ordinary negligence is one thing, and one sounding in gross negligence is another. Proof of the latter disproves the former. Pleading of the one by itself, in effect, pleads that the other does not exist. They are essentially different yet the actual wrong and the actual injury, and the compensation equivalent in money, is the same, whether the cause of action be in the one or the other. That suggests that there can be but one recovery therefor, but one efficient cause of action in the ultimate. The difficulty, as before indicated, lies, in the main, in fair doubt on the part of the pleader as regards the proper inference to be drawn from evidentiary facts. Such facts may be entirely common to the two situations.

So we return to the opening inquiry, Why in the name of the broad, beneficent spirit of the code cannot justice be rendered in a single action and upon a single trial according as the jury may reasonably draw the inference of fact? If it cannot then perhaps the written law is infirm where the unwritten was not.

If we could view the situation under discussion as involving two causes of action in the ordinary sense, the code provisions governing the matter are subdivisions 1 and 3 of section 2647, St. 1898. The one permits joining two or

more causes of action arising out of the same transaction, or transactions connected with the same subject of action. The other permits joining two or more causes of action for "injuries with or without force, to person or property." Both are subject to the limitation that the causes must belong to one class, affect all the parties, not require different places of trial, and be stated separately. It is manifest without discussion that the two causes of action, so-called, in the situation before us amply satisfy the letter of all those requirements. Do they satisfy the real meaning of the term "several causes of action" as used in the statute?

There is room, as an original matter, to hold that the statute contemplates the existence of causes of action, each to redress a wrong of some sort so far independent of the redress of any wrong involved in any other cause of action, that a recovery in one will not, necessarily, militate against a recovery at the same time in the other. Would not such a holding, leaving no room for exceptions, be construing the written law restrictively, contrary to the ordinary rule requiring remedial statutes to be liberally construed? If a restrictive, rather narrow construction were necessary to carry out a manifest intent, then it would be legitimate.

Is there the manifest intent above referred to further than to the extent of excluding from the scope of the statute the idea of joinability of two causes of action, satisfying the letter of either subdivision referred to, in a case where the assertion of the right to a remedy by one cause of action irrevocably waives the right to redress by any other; as a situation affording the wronged party opportunity to sue for damages on contract, on the theory of its continued existence, or rescind and sue to recover the consideration parted with on the contract, on the theory that it no longer exists? Does the spirit of the statute clearly exend to a situation where, instead of there being opportunity for a choice of remedies by irrevocably surrendering others which are inconsistent therewith, there are two merely apparent remedies, though only one in fact, such two not being inconsistent in the very groundwork, but only in the mere assertion of the existence of a particular essential element in one, negativing existence of a particular essential element in the other, the two being claimed because of uncertainty as to which is proper? In that situ-

ation does the unsuccessful assertion of one preclude claiming the benefit of the other?

* * * * * * * * * *

The inconsistency precluding the joining of causes of action, which we find, in general, treated in the books, is of such character that the doctrine of fatal election above indicated applies. For instance it is said in Maxwell on Code Pleading at 345:

"If the vendor in his petition seeks to recover a judgment for the unpaid purchase money, and also to have the contract canceled because of the failure of the vendee to pay the amount due, the causes of action cannot be joined, because the action to recover the amount due is an affirmance of the contract."

Treating the same subject it is said, in Bliss on Code Pleading at 122 (3d Ed.): Causes of action to be joined must not be inconsistent in that "one cause of action, if valid, should not show the others to be bad." The illustrations, however, in the main, are in harmony with the quotation from Maxwell. The same is true of the treatment of the subject by all text-writers, supported by substantially all the illustrative authorities. Remarks by the way are found, here and there, in our decisions to the same effect when applied to like situations. *Pierce v. Carey,* 37 Wis. 232.

Our code on the subject was adopted without material variance from New York. Before any change was made in New York causes were there not joinable, if inconsistency existed of such nature that an unqualified assertion of one operated as an estoppel to claim the other. It is evidently not to that class ANDREWS, J., referred to in *Krower v. Reynolds,* 99 N. Y. 245, 1 N. E. 775, in saying:

"A plaintiff may join in his complaint different and even inconsistent causes of action, provided only that they all belong to one of the classes mentioned in section 484 of the code."

The learned judge overlooked the material amendment to the section made in 1877. Nothing of the like is found in our code. The amendment added to the language as to the necessity for causes to belong to a single class the words "and be inconsistent with each other." The unqualified remark in the *Krower Case* is accounted for in 1 Nichols, New York Practice, 71, note 378, on the ground that the

amendment of 1877 was overlooked. Since such amendment we find cases condemning the joining of two causes of action, regardless of whether the mere choice of one permanently precludes resorting to the other. *McClure v. Wilson,* 13 App. Div. 274, 43 N. Y. Supp. 209; *Perkins v. Slocum,* 82 Hun., 366, 31 N. Y. Supp. 474; *Barkley v. Williams,* 30 Misc. Rep. 687, 64 N. Y. Supp. 318.

In the last case cited the pleader joined a cause of action for inadvertent misconduct with one for willful misconduct growing out of the same transaction. Under the former plaintiff was entitled to actual damages, only, while under the latter he was entitled, by force of a statute, to treble damages. This case fits pretty squarely the subject under discussion, independently of the change in the New York code and the fact that one of the causes of action was treated as on contract and the other as sounding in tort, while in the situation to be solved here both causes of action are of a tortious character. It is plain that the New York court, independently of other reasons held the two causes not joinable because of the express statutory requirement for consistency. Absence of any such express requirement from our code gives rise to a strong inference that mere inconsistency in stating causes of the same class to redress a simple injury, the assertion of neither, in case of its not being the right one, necessarily precluding resort to the other, the two in conjunction only contemplating a single satisfaction and to the same degree, as regards compensable loss, does not militate against the statute being given effect in its letter.

The inference above suggested is quite efficiently emphasized by the early case of *Whitney v. Chi. & N. W. R. Co.,* 27 Wis. 327, and the recent case of *Schulz v. Kosbab,* 125 Wis. 157, 103 N. W. 237. In each there were two or more causes of action contemplating only a single satisfaction for a single wrong, it being evident that the pleader stated his case in the double aspect because of not knowing, satisfactorily, upon what precise theory the evidence might entitle him to redress.

In both cases it was claimed that the causes of action were not joinable, because inconsistent with each other. In the first error was assigned because plaintiff was not required to choose one of the theories presented and aban-

don the rest. This court said, in effect: It might be difficult to tell in advance precisely upon what theory of the situation the loss claimed was recoverable. Of course, plaintiff was entitled to recover on whichever of the two theories of right thereto, the evidence might warrant. In general, the code requires a plaintiff to take a stand upon the cause of action he expects to recover on. But it is not always possible for a party to determine the exact ground of liability. In such circumstances, the defendant not being prejudiced for want of information regarding the injury to be redressed, there is no substantial reason why two apparent theories cannot, plaintiff acting in good faith, be joined up to such time as all reasonable uncertainty disappears as to which theory or cause of action, is the correct one. A complainant should not be precluded from presenting both of the somewhat inconsistent causes for adjudication so long as he has reasonable ground for not waiving either.

* * * * * * * * * * *

There is no precedent in our decisions to precisely fit the situation here, while there are several decisions, as we shall see, that might fairly have led the learned judge to conclude, as he did. The difficulties of the situation were such, that the reasoning in this opinion and the conclusion reached are not pregnant with any reflection upon the administration in the court below.

In *McClellan v. Chippewa Valley E. R. L. Co.*, 110 Wis. 326, 85 N. W. 1018, in harmony with the established principles of negligence law before mentioned, it was decided that there is such a definite distinction between a cause of action grounded on want of ordinary care and one grounded on the degree of wrong called gross negligence, that evidence tending to prove the latter is not admissible under a complaint charging only the former, because, said the court, "the defendant is entitled to know what the cause of action is upon which the plaintiff relies." It was not intended thereby to declare that it is incumbent on the plaintiff to make a binding choice of remedies for his injury where he cannot safely do so, and the defendant would not be prejudiced by a failure in that regard. Of course, a defendant might be prejudiced by plaintiff presenting one cause of action, as if he relied on that alone, and then being allowed to recover on another.

In *Wilson v. Chippewa Valley E. R. Co.*, 120 Wis. 636, 98 N. W. 536, 66 L. R. A. 912, the court, consistently with the foregoing, held that if a plaintiff seeks to recover on a complaint charging gross negligence alone, he cannot recover on the ground of failure of defendant to exercise ordinary care.

* * * * * * * * * * *

In *Rideout v. Winnebago Traction Co.*, 123 Wis. 297, 101 N. W. 672, 69 L. R. A. 601, the same subject came up in a little different way. The complaint charged the two degrees of wrong confusing them together. On the trial it was claimed on behalf of plaintiff, the intention was to charge gross negligence only. Evidence was introduced which might tend to support such charge or the milder degree of wrong. The court refused to adopt plaintiff's view of his pleading and submitted the case to the jury in both aspects, resulting in a verdict in favor of plaintiff on both. On appeal it was held bad for inconsistency; that there was, in effect, a finding that defendant was and that it was not guilty of each of the charges of misconduct. The cause was reversed and remanded for a new trial on the charge of gross negligence as the only one contained in the complaint. *Haverlund v. C., St. P. M. & O. Ry. Co. ante, p.* 415, took the same course.

* * * * * * * * * * *

We perceive no reason for departing from anything decided in the cases referred to. They do not militate against both causes of actionable wrong being stated in the same complaint, if stated separately, substantially eliminating indefiniteness as to plaintiff's position by indicating, clearly, that he does not know precisely the phase of actionable wrong the evidence and inferences therefrom will disclose and that, therefore, he proposes to challenge defendant on both and recover on the one actually possessed, but not on the other. It follows from the fact that the two causes of action belong to the same class, satisfy in all respects the letter of the statute respecting the joinder of causes of action, and are not inconsistent in that claiming the benefit of one necessarily waives the other. They are only inconsistent in that though one, for precautionary purposes claim the benefit of both, he can have, in the ultimate, the benefit of but one and not that one except upon a verdict definitely and consistently finding the facts.

The foregoing answers the propositions stated for decision in the opening lines of this opinion. It vindicates the letter and likewise the spirit, before referred to, of the code. It regards every phase of our judicial code of negligence law, as the same, without material change, has stood the test of more than half a century of administration, and vindicates and harmonizes all the holdings of the court relating to the subject under discussion, leading logically to a decision in this case that the trial court erred in requiring plaintiff to stand upon one of his definitely stated causes of action, abandoning the other, and erred in dismissing the case for noncompliance with such requirement.

* * * * * * * * * * *

BY THE COURT: The judgment is reversed, and the cause remanded for further proceedings according to law.[1]

TIMLIN, J.: I concur in the result reached, in this case.

[1] Identically the same joinder was permitted in Waechter v. St. Louis & M. R. R. R. Co. (1905), 113 Mo. App. 270.

CHAPTER IV.

THE COMPLAINT OR PETITION.[1]

SECTION 1. FACTS CONSTITUTING A CAUSE OF ACTION.

BOX v. CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

Supreme Court of Iowa. 1899.

107 Iowa, 660.

Action for personal injuries. In August, 1892, the plaintiff was in the employ of defendant as a brakeman on one of its trains, and was injured in the act of coupling

[1] THE CODE PROVISIONS ON THIS SUBJECT IN THE VARIOUS STATES ARE AS FOLLOWS:

Alaska. Carter's Ann. Codes, 1900, § 57.

"The complaint shall contain: 1. The title of the cause, specifying the name of the court and the names of the parties to the action, plaintiff and defendant. 2. A plain and concise statement of the facts constituting the cause of action, without unnecessary repetition. 3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded the amount thereof shall be stated."

Arizona. Rev. St., 1901, § 1289.

"The complaint shall set forth clearly the names of the parties, a concise statement of the cause of action, without any distinction between suits at law and in equity, and shall also state the nature of the relief which he demands."

Arkansas. Kirby's Digest, 1904, § 6091.

"The complaint must contain: 1. The style of the court in which the action is brought. 2. The style of the action, consisting of the names of all the parties thereto, distinguishing them as plaintiffs and defendants, followed by the words 'complaint at law,' if the proceedings are at law, and by the words 'complaint in equity,' if the proceedings are equitable. 3. A statement in ordinary and concise language, without repetition, of the facts constituting the plaintiff's cause of action. 4. A demand of the relief to which the plaintiff considers himself entitled."

California. Kerr's Codes, Civ. Proc., 1909, § 426.

"The complaint must contain: 1. The title of the action, the name of the court and county in which the action is brought, and the names of the parties to the action; 2. A statement of the facts constituting the cause of action, in ordinary and concise language; 3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated."

Colorado. Rev. St., 1908, § 55.

"The complaint shall contain: 1. The title of the cause, specifying

its cars. The original petition was filed August 5, 1893. * * *

On the 21st day of August, 1893, the defendant filed a general denial. On the 8th day of September, 1896, the plaintiff filed an amendment to the petition. * * *

A demurrer was sustained to the amendment to the pe-

the name of the court and the name of the county in which the action is brought, and the names of the parties to the action, plaintiff and defendant. 2. A statement of the facts constituting the cause of action, in ordinary and concise language, without unnecessary repetition. 3. A demand for the relief which plaintiff claims, and if the recovery of money or damages be demanded, the amount thereof shall be stated."

Connecticut. Gen'l St., 1902, § 607.

"The complaint shall contain a statement of the facts constituting the cause of action, and a demand for the relief to which he supposes himself to be entitled."

Idaho. Rev. Codes, 1908, § 4168.

Same as California provision, *supra.*

Indiana: Burns' St., 1908, § 343.

"The complaint shall contain: 1. The title of the cause, specifying the name of the court and county in which the action is brought, and the names of the parties to the action, plaintiff and defendant. 2. A statement of the facts constituting the cause of action, in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. 3. Where the complaint contains more than one cause of action, each shall be distinctly stated in a separate paragraph, and numbered. 4. A demand of the relief to which the plaintiff may suppose himself entitled. If the recovery of money be demanded, the amount thereof shall be stated."

Iowa. Code, 1897, § 3559.

Substantially identical with the provisions in Arkansas, with addition of "5. Where the petition contains more than one cause of action, each must be stated wholly in a count or division by itself, and must be sufficient in itself; but one prayer for judgment may include a sum based on all accounts seeking a money remedy. In a petition by equitable proceedings, each division shall also be separated into paragraphs numbered as such, and each paragraph shall contain, as near as may be convenient, a complete and distinct statement."

Kansas. Gen'l St., 1909, § 5685.

"The petition must contain: 1. The name of the court and the county in which the action is brought, and the names of the parties plaintiff and defendant, followed by the word 'petition.' 2. A statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition. 3. A demand of the relief to which the party supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated; and if interest thereon be claimed, the time from which interest is to be computed shall also be stated."

Kentucky. Carroll's Code, 1895, § 90.

"The petition must state facts which constitute a cause of action in favor of the plaintiff against the defendant, and must demand the specific relief to which the plaintiff considers himself entitled; and may contain a general prayer for any other relief to which the plaintiff may appear to be entitled."

Minnesota. Rev. Laws, 1905, § 4127.

"The complaint shall contain: 1. The title of the action, naming the court and the county in which it is brought, and the parties, plaintiff and defendant,

tition, and, after an amendment to the answer and a reply, the cause proceeded to trial on the averments as stated in the original petition. At the close of the evidence the court, on motion of defendant, directed a verdict in its favor, and from a judgment thereon the plaintiff appealed.

Affirmed.

GRANGER, J.: 1. The condition of the record leads us

therein. 2. A plain and concise statement of facts constituting a cause of action, without unnecessary repetition. 3. A demand for the relief desired by the plaintiff; and, if a recovery of money be demanded, the amount shall be stated."

Missouri. Ann. St., 1906, § 592.

"The petition shall contain: 1. The title of the cause, specifying the term, the name of the court and the county in which the action is brought, and the names of the parties to the action, plaintiffs and defendants. 2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition. 3. A demand of the relief to which the plaintiff may suppose himself entitled. If the recovery of money be demanded, the amount thereof shall be stated, or such facts as will enable the defendant and the court to ascertain the amount demanded."

Montana. Rev. Codes, 1907, § 6532.

Identical with California provision, *supra*.

Nebraska. Comp. St., 1911, § 6666.

Identical with Kansas provision, with the exception that the clause "followed by the word 'petition'" found in the first sub-division of Kansas statute is absent.

Nevada. Comp. Laws, 1900, § 3134.

Same as Colorado provision, *supra*, with exception that the phrase, "without unnecessary repetition" in (2) of the Colorado act is absent.

New Mexico. Comp. Laws, 1897, § 2685, sub-sec. 32.

Identical with California provision, *supra*.

New York. Chase's Code Civ. Proc., 1910, § 481.

"The complaint must contain: 1. The title of the action specifying the name of the court in which it is brought, if it is brought in the supreme court, the name of the county, which the plaintiff designates as the place of trial; and the names of all the parties to the action, plaintiff and defendant. 2. A plain and concise statement of the facts constituting each cause of action without unnecessary repetition. 3. A demand of the judgment to which the plaintiff supposes himself entitled."

North Carolina. Rev. of 1905, § 467.

"The complaint shall contain: 1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the trial is required to be had, and the names of the parties to the action, plaintiff and defendant. 2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition; and each material allegation shall be distinctly numbered. 3. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof must be stated."

North Dakota. Rev. Codes, 1905, § 6852.

Same as North Carolina, *supra*, with the following change in (1): instead of the words "the trial is required," there are the words "the plaintiff

to understand that the amendment to the petition, to which the demurrer was directed, was treated as a separate count; for, after it was held bad on demurrer, the case proceeded to trial as to the original petition. It will be seen that the amendment was filed some four years after the accident occurred, and actions of this character are barred by the statute of limitations in two years. The demurrer to the amendment raises the question whether it presents a new or separate cause of action, so as to

desires the trial"; and there is omitted the clause in (2), "and each material allegation shall be distinctly numbered."

Ohio. Gen Code, 1910, § 11305.
"The petition shall contain: 1. A statement of facts constituting a cause of action in ordinary and concise language. 2. A demand for the relief to which the plaintiff claims to be entitled, if the recovery of money is demanded, the amount shall be stated; and if interest is claimed, the time for which interest is to be computed shall be stated."

Oklahoma. Comp. Laws, 1909, § 5627.
Identical with Kansas statute, *supra.*

Oregon. Lord's Laws, 1910, Code Civ. Pro., § 67.
"The complaint shall contain: 1. The title of the cause, specifying the name of the court, and the names of the parties to the action, plaintiff and defendant. 2. A plain and concise statement of the facts constituting the cause of action, without unnecessary repetition. 3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof shall be stated."

South Carolina. Code of Laws, 1902, § 163.
"The complaint shall contain: 1. The title of the cause, specifying the court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to the action —plaintiff and defendant. 2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition. 3. A demand of the relief to which the plaintiff supposes himself entitled."

South Dakota. Rev. Codes, Civ. Pro., 1903, § 119.
Same as South Carolina, with addition in (3) of clause "If the recovery of money be demanded, the amount thereof shall be stated."

Utah. Comp. Laws, 1907, § 2960.
Identical with California statute, *supra.*

Washington. Rem. & Ball. Codes, § 258.
Same as the South Dakota statute, *supra.*

Wisconsin. St., 1898, § 2646.
"The complaint shall contain: 1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county designated by the plaintiff as the place of trial and the names of the parties to the action, plaintiff and defendant. 2. A plain and concise statement of the facts constituting each cause of action, without unnecessary repetition. 3. A demand of the judgment to which the plaintiff supposes himself entitled; if the recovery of money be demanded, the amount thereof shall be stated."

Wyoming. Comp. St., 1910, § 4379.
Substantially identical with the Kansas provision, *supra,* omitting the phrase "without unnecessary repetition" in (2).

come within the operation of the statute of limitations. A reference to the averments of the original petition will show that the negligence charged is in using different systems of drawbars or bumpers in the coupling of its trains on the day of the accident, instead of the ordinary, improved drawbar or bumper on its line of road. The acts of negligence charged in the amendment are entirely different, and show a right of recovery independent of, and without regard to, the acts charged as negligence in the original petition; the latter negligence being in the way and manner of using the drawbars,—in having them loose and out of repair,—so that the injury arose from negligence in the way the drawbars were used, and not from the fact that different systems were used. * * *

A "cause of action," as the term is used in pleading, is not the same under which a state of facts may be classed, but it consists of the facts giving rise to the action. An action is a proceeding in court. Code, § 3424. The cause of the action is the fact or the facts that "justify it or show the right to maintain it." Hence, when a material fact, necessary to a recovery, is omitted from a petition, we say it does not state a cause of action. In 5 Am. & Eng. Enc. Law, 776, it is said: "The cause of action is the entire state of facts that gives rise to an enforceable claim. The phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment." This definition is taken, substantially, from the case of *Read v. Brown,* 22 Q. B. Div. 128. In that case it is said that a cause of action is "every fact which it would be necessary for plaintiff to prove, if traversed, in order to support his right to the judgment of the court." It is then said: "It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved." In *Hutchinson v. Ainsworth,* 73 Cal. 452, 15 Pac. 82, speaking of a cause of action with reference to the statute of limitations, it is said: "The facts upon which the plaintiff's right to sue is based, and upon which the defendant's duty has arisen, coupled with the facts which constitute the latter's wrong, make up the cause of action." The *Bruil v. Association,* 72 Wis. 430, 39 N. W. 529, and Rap. & L. Law Dict. 180. Care should be taken not to confuse the term "cause of action" as used abstractly and as used in pleading. In a general

sense, the term means "a claim which may be enforced." *Bucklin v. Ford,* 5 Barb. 393. "It is a right which a party has to institute and carry through an action." *Myer v. Van Collem,* 28 Barb. 230. "The right to prosecute an action with effect." *Douglas v. Forrest,* 4 Bing. 704. Looking to these cases, it will be seen that the term "cause of action" is used with no purpose to indicate a rule by which the cause of action may be distinguished from another, but merely with reference to the existence of a cause of action. We use expressions like these: "A cause of action for negligence;" "a cause of action for malicious prosecution;" "a cause of action for desertion." They indicate the subject or subject-matter of the action, but are meaningless as showing a particular cause of action. In *Rodgers v. Association,* 17 S. C. 406, are the following query and answer: "What is a cause of action? We must keep in view the difference between the subject of the action and the cause of the action. The subject of the action was what was formerly understood as the subject-matter of the action. * * * The cause of action is the right claimed or wrong suffered by the plaintiff, on the one hand, and the duty or delict of the defendant, on the other; *and these appear by the facts of each separate case.*" We have emphasized the closing words to call especial attention to the rule when applied to a particular case. The application of the rule to this case leaves no doubt what the conclusion should be. The original petition stated a complete cause of action, and the amendment stated another. The two causes of action are so distinct and separate that either could be established without reference to a fact of negligence alleged in the other. Appellant says the cause of action is "the injury wrongfully inflicted by the defendant through the negligence of the defendant." That means a cause of action based on defendant's negligence, and, if that is the meaning of the term, for the purposes of pleading, then no amendment would be vulnerable to the objection that it stated a separate cause of action, so long as the facts pleaded constituted negligence. No authority that we have seen sustains such a rule. * * *

The judgment is affirmed.

SECTION 2. CERTAINTY, DEFINITENESS AND PARTICULARITY.

(a) In Contract Cases.

WEEKS v. O'BRIEN.

Court of Appeals of New York. 1894.

141 New York, 199.

PER CURIAM. The complaint was dismissed, on the ground that it contained no averment that the architect unreasonably withheld his certificate of the completion of the building. The complaint was defective in this respect. By the true construction of the building contract, the procuring by the plaintiff of the certificate of the architect that the building had been completed was a condition precedent to his right to recover, under the contract, the last installment of $6,158, for which this action is brought. To meet this condition, and to show a right of action, it should have been averred in the complaint, either generally or specially, that the conditions precedent had been performed, or if the plaintiff relied upon a matter excusing him from procuring the certificate, the facts should have been stated. *Thomas v. Fleury,* 26 N. Y. 26; *Bowery Nat. Bank v. Mayor, etc., of New York,* 63 N. Y. 336; *Doll v. Noble,* 116 N. Y. 233; *Oakley v. Morton,* 11 N. Y. 25. The complaint neither averred that the certificate had been procured, nor that it was unreasonably withheld. A copy of the contract containing the provision as to the architect's certificate was annexed to the complaint. The action was upon the contract, and the complainant alleged performance by the plaintiff, and that the building had been substantially completed according to its terms. The contract made the architect's certificate the evidence of that fact, and the plaintiff could not recover upon an allegation of performance, upon proving that the building had in fact been completed, without procuring the architect's certificate, or showing that it had been unreasonably refused, or that the defendant had waived its production.

A defendant is authorized to raise the objection that the complaint does not state facts sufficient to constitute a cause of action on the trial, although the objection has not

been taken either by demurrer or answer. Code, § 499. At the conclusion of the plaintiff's evidence the defendant's counsel moved to dismiss the complaint on the ground that, under the contract, the certificate of the architect was a condition precedent. The counsel for the plaintiff asked to go to the jury upon a question of unreasonable refusal of the architect to give the certificate. The court, in answer, said that there is no such issue, and referred to the fact that there was no allegation upon the subject in the complaint. This was the first reference on the trial to any defect in the pleading. * * * It is claimed that, no question having been raised, until the conclusion of the plaintiff's evidence, as to the sufficiency of the complaint upon the point of the architect's certificate, and the trial having proceeded upon the issue whether the work had been actually completed, without objection, it was then too late to raise the question of the sufficiency of the complaint in that respect. The court might very well have permitted an amendment, but no application to amend was made, and we think it was not too late to raise the objection at the conclusion of the plaintiff's case.[1] * * *

* * * * * * * * * * *

[1] Statutes in many states declare that in pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part. In the absence of such a statute the common-law rule applies, that the time, place and manner of the performance of each condition must be alleged specifically. The statute, however, is permissive merely, and the pleader may choose which method he will adopt; but if he undertakes a specific allegation of performance he will be held strictly to the common-law requirements. Witt v. Old Line Bankers' Life Ins. Co. (1911), 89 Neb. 163; Korbley v. Loomis (1909), 172 Ind. 352. 172 Ind. 352.

SOUTHERN INDIANA LOAN AND SAVINGS INSTITUTION v. ROBERTS.

Appellate Court of Indiana. 1908.

42 Indiana Appellate, 653.

RABB, J.: The appellant brought this suit in the court below against the appellees, seeking to foreclose a mortgage on certain real estate described, and also to recover

a personal judgment against the appellees, William M. Smith and Walter Jones, who are alleged to have been subsequent grantees from Roberts of the premises mortgaged.
* * *

The theory upon which appellant claims a right to a personal judgment against Smith and Jones is that they are subsequent purchasers of the property, and that they assumed the payment of the mortgage upon the premises.

The statute of frauds provides that no action shall be brought to charge any person upon any special promise to answer for the debt, default, or miscarriage of another, unless the promise, contract, or agreement or some memoranda thereof shall be in writing and signed by the party to be charged therewith. The mortgage debt which appellant seeks to charge the appellees Smith and Jones with in this action was not primarily their debt. It was the debt of Roberts, and, in order to make a case against them of personal liability for this debt of Roberts, such facts must be averred in the complaint and proved upon the trial as take the case out of the operation of this statute, and render this debt the debt of Jones and Smith. It is the well-settled law that where a conveyance of land is made, and the grantee assumes to pay, as a part of the consideration for the conveyance, a mortgage debt due from the grantor, that the debt thus assumed to be paid is not the debt of a third person within the meaning of the statute of frauds, but becomes the debt of the grantee, and he is personally liable upon his contract, whether it be in writing or expressed orally. This doctrine is announced by the Supreme Court in the case of *McDill v. Gunn*, 43 Ind. 315, and is followed by a long line of decided cases in this state.

* * * * * * * * * * *

It is a well-defined rule of pleading that, when a right of action is undertaken to be set up founded on an oral contract, or a written contract that does not import a consideration, it is necessary that the consideration for such promise be stated in the complaint with such particularity as will enable the court to decide whether or not the promise sued upon is supported by a sufficient legal consideration. *Wheeler v. Hawkins*, 101 Ind. 486; *Windell v. Hudson*, 102 Ind. 521; *Higham v. Harris*, 108 Ind. 257; *Metzger v. Franklin Bank*, 119 Ind. 360; *Louisville, etc., R. Co. v. Barnes*, 16 Ind. App. 312.

In this case all the appellant's complaint avers upon the subject of the contract under which he claims a right to a personal judgment against the appellee is as follows: "That on the 3d day of September, 1902, the defendant John J. Roberts conveyed by warranty deed the above-mortgaged premises to the defendants William M. Smith and Walter J. Jones, who each assumed to pay the mortgage aforesaid." It is not averred that the promise to pay Roberts' mortgage note was in writing, or that it was included in the terms of the deed under which the parties took title to the premises. It avers as one distinct fact that the property was conveyed to Jones and Smith, and as another distinct fact, not necessarily relating to the conveyance to Jones and Smith in any manner that they, Jones and Smith, "assumed," which means nothing more than that they "promise," to pay Roberts' debt. It is to be inferred that the contract was oral, because it is not averred to have been in writing. It is to be inferred that it was not included in the deed by which Jones and Smith acquired title, for, had it been, it would necessarily have been evidenced by writing, and the deed, or a copy, would have been a necessary part of the complaint. The averments of the complaint amount to nothing more than a bald assertion of an oral agreement with some undisclosed party on the part of Jones and Smith to pay Roberts' debt, and, for aught that appears in the averments of the complaint, the promise to pay the Roberts mortgage may have been made long after the conveyance of the land to Jones and Smith, and without any consideration whatever; and it may have been made, not to Roberts in consideration of the sale of the land, but to the creditors themselves.

In every case that has come to our attention in which the right to enforce an oral contract to pay a mortgage debt made by a purchaser of the mortgaged premises has been upheld, the complaint has averred facts showing that the assumption of the debt was a part of the consideration of the sale of the land. Set out in the complaint what the consideration was, so that the court could say that the contract was not within the statute of frauds. The complaint was clearly insufficient to authorize a personal judgment against appellee. This being so, any ruling made by the court on

the demurrer to the answer or motion for a new trial was harmless.

Judgment affirmed.[1]

WATSON, C. J., not participating. ROBY, J., dissents.

[1] The general rule is that a contract required to be in writing under the Statute of Frauds will be presumed to be written, when the pleading is silent as to whether it is written or oral. Kilpatrick-Koch Dry Goods Co. v. Box (1896), 13 Utah 494; Sowards v. Moss (1899), 58 Neb. 119; Levy v. Ryland (1910), 32 Nev. 460; Ruth v. Smith (1901), 29 Colo. 154; Bradford Inv. Co. v. Joost (1897), 117 Cal. 204; Matthews v. Matthews (1897), 154 N. Y. 288.

MOODY v. INSURANCE COMPANY.

Supreme Court of Ohio. 1894.

52 Ohio State, 12.

WILLIAMS, J.: 1. The policy of insurance upon which the plaintiff sought to recover in the action below provides, among its many conditions, that "no liability shall exist under this policy for loss or damage in or on vacant or unoccupied buildings, unless consent for such vacancy or nonoccupancy be indorsed hereon." The answer alleges that the house insured by the policy was burned while it was unoccupied; and, though that allegation was denied, the court required the plaintiff to take the burden of proving that the building was occupied. That action of the court is assigned for error, and presents the first question for consideration.

The court went upon the theory that the provision of the policy above quoted constitutes a condition precedent, the performance of which was put in issue by the denial of the averments of the petition. In an action on a policy of fire insurance, the plaintiff may plead generally, as was done in this case, the due performance of all the conditions precedent on his part, and when the allegation is controverted the burden is undoubtedly upon him to show such performance. But we do not understand the clause of the policy in question to be a condition of that kind. An unexpired policy of fire insurance, which has been regularly issued, and remains uncanceled, must, in the absence of a showing

its cars. The original petition was filed August 5, 1893. * * *

On the 21st day of August, 1893, the defendant filed a general denial. On the 8th day of September, 1896, the plaintiff filed an amendment to the petition. * * *

A demurrer was sustained to the amendment to the pe-

the name of the court and the name of the county in which the action is brought, and the names of the parties to the action, plaintiff and defendant. 2. A statement of the facts constituting the cause of action, in ordinary and concise language, without unnecessary repetition. 3. A demand for the relief which plaintiff claims, and if the recovery of money or damages be demanded, the amount thereof shall be stated."

Connecticut. Gen'l St., 1902, § 607.

"The complaint shall contain a statement of the facts constituting the cause of action, and a demand for the relief to which he supposes himself to be entitled."

Idaho. Rev. Codes, 1908, § 4168.

Same as California provision, *supra.*

Indiana: Burns' St., 1908, § 343.

"The complaint shall contain: 1. The title of the cause, specifying the name of the court and county in which the action is brought, and the names of the parties to the action, plaintiff and defendant. 2. A statement of the facts constituting the cause of action, in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. 3. Where the complaint contains more than one cause of action, each shall be distinctly stated in a separate paragraph, and numbered. 4. A demand of the relief to which the plaintiff may suppose himself entitled. If the recovery of money be demanded, the amount thereof shall be stated."

Iowa. Code, 1897, § 3559.

Substantially identical with the provisions in Arkansas, with addition of "5. Where the petition contains more than one cause of action, each must be stated wholly in a count or division by itself, and must be sufficient in itself; but one prayer for judgment may include a sum based on all accounts seeking a money remedy. In a petition by equitable proceedings, each division shall also be separated into paragraphs numbered as such, and each paragraph shall contain, as near as may be convenient, a complete and distinct statement."

Kansas. Gen'l St., 1909, § 5685.

"The petition must contain: 1. The name of the court and the county in which the action is brought, and the names of the parties plaintiff and defendant, followed by the word 'petition.' 2. A statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition. 3. A demand of the relief to which the party supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated; and if interest thereon be claimed, the time from which interest is to be computed shall also be stated."

Kentucky. Carroll's Code, 1895, § 90.

"The petition must state facts which constitute a cause of action in favor of the plaintiff against the defendant, and must demand the specific relief to which the plaintiff considers himself entitled; and may contain a general prayer for any other relief to which the plaintiff may appear to be entitled."

Minnesota. Rev. Laws, 1905, § 4127.

"The complaint shall contain: 1. The title of the action, naming the court and the county in which it is brought, and the parties, plaintiff and defendant,

tition, and, after an amendment to the answer and a reply, the cause proceeded to trial on the averments as stated in the original petition. At the close of the evidence the court, on motion of defendant, directed a verdict in its favor, and from a judgment thereon the plaintiff appealed.

Affirmed.

GRANGER, J.: 1. The condition of the record leads us

therein. 2. A plain and concise statement of facts constituting a cause of action, without unnecessary repetition. 3. A demand for the relief desired by the plaintiff; and, if a recovery of money be demanded, the amount shall be stated."

Missouri. Ann. St., 1906, § 592.
"The petition shall contain: 1. The title of the cause, specifying the term, the name of the court and the county in which the action is brought, and the names of the parties to the action, plaintiffs and defendants. 2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition. 3. A demand of the relief to which the plaintiff may suppose himself entitled. If the recovery of money be demanded, the amount thereof shall be stated, or such facts as will enable the defendant and the court to ascertain the amount demanded."

Montana. Rev. Codes, 1907, § 6532.
Identical with California provision, *supra*.

Nebraska. Comp. St., 1911, § 6666.
Identical with Kansas provision, with the exception that the clause "followed by the word 'petition'" found in the first sub-division of Kansas statute is absent.

Nevada. Comp. Laws, 1900, § 3134.
Same as Colorado provision, *supra*, with exception that the phrase, "without unnecessary repetition" in (2) of the Colorado act is absent.

New Mexico. Comp. Laws, 1897, § 2685, sub-sec. 32.
Identical with California provision, *supra*.

New York. Chase's Code Civ. Proc., 1910, § 481.
"The complaint must contain: 1. The title of the action specifying the name of the court in which it is brought, if it is brought in the supreme court, the name of the county, which the plaintiff designates as the place of trial; and the names of all the parties to the action, plaintiff and defendant. 2. A plain and concise statement of the facts constituting each cause of action without unnecessary repetition. 3. A demand of the judgment to which the plaintiff supposes himself entitled."

North Carolina. Rev. of 1905, § 467.
"The complaint shall contain: 1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the trial is required to be had, and the names of the parties to the action, plaintiff and defendant. 2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition; and each material allegation shall be distinctly numbered. 3. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof must be stated."

North Dakota. Rev. Codes, 1905, § 6852.
Same as North Carolina, *supra*, with the following change in (1): instead of the words "the trial is required," there are the words "the plaintiff

LENT v. NEW YORK AND MASSACHUSETTS RAILWAY COMPANY.

Court of Appeals of New York. 1892.

130 New York, 504.

This action was brought upon an award of commissioners of appraisal, appointed on application of defendant to appraise lands of John R. Lent, to be taken by defendant for railroad purposes.

The complaint alleges the incorporation of the defendant; the presentation to the Supreme Court, pursuant to the statute of this state, of a petition by said railroad company asking for the appointment of commissioners to ascertain and appraise the compensation to be made to plaintiff John R. Lent and others for certain real estate which said corporation desired to take for railroad purposes; the appointment of commissioners, and of Henry M. Taylor as special guardian for said Lent in said proceedings, and a report by said commissioners that the amount which ought to be paid to said Lent for said real estate was the sum of $14,270, and to said special guardian for costs and expenses the sum of $300; that said report was, upon motion of the railroad company, confirmed, and an order entered directing said company to pay said sums to said Henry M. Taylor, special guardian of said Lent; that subsequently said defendant appealed to the general term from said order; and that the said report and order had been upon such appeal duly affirmed. These allegations were followed by a prayer for judgment for the amount of the award and costs.

The defendant demurred to the complaint upon the grounds: * * * (5) that the complaint did not state facts sufficient to constitute a cause of action.

BROWN, J.: * * * The effect of the recording of the order was to create a debt against the defendant, and in that respect its liability is analogous to a liability arising upon the maturity of a contract for the payment of money, and the question is presented whether an allegation of nonpayment is essential and material to the cause of action.

The code (section 481) provides that a complaint must

contain a plain and concise statement of the facts constituting the cause of action, and the general rule deduced therefrom is that whatever facts are essential to be proven to entitle the plaintiff to recover upon the trial must be alleged in the complaint.

It does not admit of controversy that, upon an ordinary contract for the payment of money, non-payment is a fact which constitutes the breach of the contract, and is the essence of the cause of action, and, being such, within the rule of the code it should be alleged in the complaint. It is said, however, that payment is always an affirmative defense, which must be pleaded to be available, and hence non-payment need not be alleged, as it is not a fact put in issue by a general denial. *Salisbury v. Stinson,* 10 Hun, 242.

The rule that payment is an affirmative defense is not one embodied in the code, but had its origin under the common-law practice in the plea of *non assumpsit;* and the reason for it was that in *assumpsit* the allegation in the declaration and the traverse in the plea were in the past tense, and, under the rule which excluded all proof not strictly within the issue, no evidence was admissible, except such as had a tendency to show that the defendant never had made the promise.

It was never applied in the action of debt, the allegation in that form of action being in the present tense, and, under the plea of *nil debet,* any fact tending to show that there was no indebtedness on the part of the defendant was admissible. The history of the rule is set forth in Judge SELDEN'S opinion in *McKyring v. Bull,* 16 N. Y. 297, and need not be referred to here.

Following the rule thus established, the courts have uniformly held, since the adoption of the code, that payment must be pleaded, and cannot be proven under the general issue.

While the effect of these decisions is to modify somewhat the rule embodied in section 500 of the code, their tendency is to simplify pleading, as under their application the plaintiff is informed of the precise defense intended to be made, and thus unnecessary preparation is obviated, and surprise on the trial avoided.

But there is no need to further extend the rule, and hold that, because payment as a defense must be pleaded, the breach of the agreement need not be alleged in the com-

plaint. That would have the contrary effect, and lead to embarrassments that are avoided when the plain provisions of the code are followed.

No authority exists, so far as I am able to find, except in the case of *Salisbury v. Stinson,* holding that a breach of the contract need not be pleaded, but all text-writers and reported cases hold to the contrary. I Chit. Pl. & Pr. pp. 325-359; Com. Dig. tit. "Pleader," C, 44; 2 Wait, Law & Pr. p. 318; 1 Wait, Act. & Def. pp. 394, 395, and cases cited; *Witherhead v. Allen,* 4 Abb. Dec. 628; *Tracy v. Tracy,* (Sup.) 12 N. Y. Supp. 665; *Van Giesen v. Van Giesen,* 10 N. Y. 316; *Krower v. Reynolds,* 99 N. Y. 245, 1 N. E. Rep. 775.

Witherhead v. Allen arose upon a demurrer to a complaint. The opinion states the rule as follows: "When the action is founded upon the contract obligation or duty of the defendant, the very gist and essence of the cause of action is the breach thereof by the defendant, and, unless a breach is alleged, no cause of action is shown.

In *Van Giesen v. Van Giesen,* 10 N. Y. 316, it is said: The material allegations of the complaint in this case are the making by the defendants of the promissory note, the transfer of it to the plaintiff, and the non-payment by the defendants. Each of them is material, for without the concurrence of all of them the complaint would not show a cause of action.

To the same effect is *Keteltas v. Myers,* 19 N. Y. 231. See, also, Code, § 534, 1213, subd. 2.

In *Krower v. Reynolds* it was held, in an action on a covenant to pay a mortgage, that it was necessary to allege that the mortgage had not been paid, or that the defendant had failed to perform his covenant, and without such allegation the complaint was demurrable.

And in numerous cases, which need not be cited, but of which *Allen v. Patterson,* 7 N. Y. 476, is a type, the rule is recognized by implication, but the complaints were held good because of an allegation of indebtedness by the defendant to the plaintiff. This rule is further recognized in section 534 of the code, which provides a simple form of pleading on an instrument for the payment of money only, but requires the plaintiff to state the sum which he claims to be due to him thereon. Again, the complaint, when verified, and there is no answer, stands as proof of the plain-

tiff's claim, and the clerk is authorized to enter judgment thereon.

But if the plaintiff is not required to allege a breach of the contract or state the amount due, as his verification would cover only the facts alleged, the clerk, under sections 420, 1212, and 1213 of the code, would be authorized to enter judgment for the whole amount called for by the contract, and this without proof of the amount due thereon. This would be contrary to the whole spirit of the code, and would require the clerk to presume a fact neither alleged nor proved, viz., that no payment had been made.

These views show how essential to the practice it is that the plaintiff should allege the breach of the contract of which he complains. That breach is always a fact, and is of the very essence of the cause of action. The complaint should show such facts which, if verified and not denied, prove to the clerk that the plaintiff is entitled to judgment for the amount he demands.

It cannot be said that, where the breach consists in nonpayment of an agreed sum, it is not an issuable fact, because payment cannot be proven under general denial. The most that can be said is that that form of denial does not put that fact in issue, and to that extent the rule that payment must be pleaded must be deemed to modify the rule of pleading under the code in reference to a general denial.

But no reason is apparent how it can justify the omission from the complaint of a fact material to the plaintiff's cause of action, and essential to be proved to entitle the plaintiff to a judgment. Such facts, under the code, must be pleaded. No presumption can be indulged in that a defendant has failed in his duty or omitted to perform his contract obligation.

There was no allegation in the complaint in this action that the defendant had failed or omitted to pay the award, and no allegation of indebtedness, and without such no cause of action was stated.

On this ground we are of the opinion that the demurrer was well taken.

Other objections to the complaint were discussed upon the argument, but none of them are considered well taken.

The judgment must be reversed, and the demurrer sustained, with costs, with leave to the plaintiffs to amend the

complaint within 30 days on payment of costs. All concur, except FOLLETT, C. J., and VANN, J., dissenting.

Judgment reversed.[1]

[1] *Method of assigning breaches.* In Jones County v. Sales (1868), 25 Iowa 25, the court approved and adopted the common law practice, saying: "At the common law it was sufficient to assign a breach, in the words of the contract, either negatively or affirmatively, or in words co-extensive with the import and effect of the contract; and the rule was, that as the defendant must know in what respects he has or has not performed his contract, any great particularity ought not on principle to be required. Accordingly it has been held, that in assumpsit on a promise to manage a farm in a good and husbandlike manner, it was sufficient to assign a breach in the words of the promise; and a breach in the words of the covenant for not repairing, when not qualified, without enumerating the particular dilapidations, will suffice; and in covenant by an apprentice for not finding victuals and other necessaries, a breach in the words of the contract is sufficient. 1 Chitty on Pleadings, 332, 333, and notes." See also Wilson v. Clarke (1874), 20 Minn. 367, citing the same page in Chitty.

But a more particular assignment may sometimes be necessary. "In assigning breaches of the usual covenants accompanying the transfer of lands the general rule is that the pleader may assign them generally unless such an assignment does not amount to a breach. For instance, as against the covenant of seisin, or that the grantor has good right to convey, it is sufficient to say that he was not seized, or had not good right to convey, for such an allegation necessarily negatives the undertaking of the covenant. But not so as it respects the covenant against incumbrances, the covenant of warranty, and that for quiet enjoyment, as the grantor does not covenant against all possible incumbrances, or all interruptions or claims or ousters, and it thereby becomes necessary to specify the incumbrance or title paramount by reason of which the covenantee or his assigns have been ousted or disturbed in possession." Jennings v. Kiernan (1898), 35 Ore. 349.

In an action for breach of warranty of a machine "it is necessary to allege wherein this engine fails to comply with the warranty or the particular defects in it." Shirk v. Mitchell (1893), 137 Ind. 185.

BOWEN v. EMMERSON.

Supreme Court of Oregon. 1869.

3 Oregon, 452.

UPTON, J.: The objection, that the complaint does not state facts sufficient to constitute a cause of action, is not waived by failing to demur. (Code, sec. 70.)

The complaint states that, "on or about the eighteenth day of February, 1868, plaintiffs sold and delivered to the defendant, 4,000 lbs. of flour, and that the same was worth $212." It does not show that the defendant undertook or became obligated to pay for the flour within a designated

time, or within a reasonable time, or when requested; nor that the time of payment had arrived before the commencement of the action. For aught that appears from the facts stated, the property may have been sold on credit, the time of which has not yet expired; or it may have been sold and delivered to the defendant upon the request and credit of another, with a full understanding that the defendant was not to pay for it. It is assumed in argument that complaints like the one under consideration are sustained, by adjudications in other state, under codes similar to ours; and particular reference is made to the state of New York. A careful examination of the cases cited in support of this proposition will show that it is not correct. * * *[1]

It is not necessary in this case to determine to what extent the case of *Allen v. Patterson,* 7 N. Y. 476, should be considered law, because the complaint in this case does not show, by stating either facts or conclusions, that the defendant is indebted. The case of *Farron v. Sherwood* (3 Smith (N. Y.) 229) states the following rule, which seems entirely consistent with the enactments of the code: "It was not necessary to state in terms a promise to pay, it was sufficient to state facts showing the duty from which the law implies a promise." A fault with the complaint in this case is that it neither states a promise to do any certain act at any specified time, nor states facts from which a duty to do so necessarily arises; or from which a promise is necessarily inferred. * * * In this class of actions, the pleader is required to state the facts, that show that a contract existed between the parties, that it has been broken, and in what particular, and the amount of damages the breach has caused. Facts only must be stated, as contradistinguished from the law, from argument from conclusions, and from the evidence required to prove the facts. (*Coryell v. Cain,* 16 Cal. 571.)

The complaint does not in this case state facts sufficient to constitute a cause of action.

Judgment should be reversed.

[1] The court here severely and justly criticises the rule laid down in the well known case of Allen v. Patterson, 7 N. Y. 476, as follows: "The opinion assumes, without argument and without citing any authority relating to the construction of any modern code, that the statement, that the defendant is indebted to the plaintiff in a certain sum, is the statement of a fact,* * *. The statement that the defendant is indebted to the plaintiff, is substantially the conclusion to be found by the jury at the end of the investigation."

CONRAD NATIONAL BANK v. GREAT NORTHERN RAILWAY COMPANY.

Supreme Court of Montana. 1900.

24 Montana, 178.

Assumpsit by Conrad National Bank of Kalispell against the Great Northern Railway Company to recover a balance on account of labor performed for defendant, and for board, food, and lodging, and goods, wares, and merchandise, furnished by plaintiff's assignor to employes of defendant at its special instance and request. Defendant's demurrer to the complaint was overruled, and judgment entered in favor of plaintiff, and defendant appeals.

Reversed.

PER CURIAM: * * * The question presented for our consideration is whether the complaint states a cause of action.

The paragraph of the complaint to which the demurrer is directed is the following: "That between the 1st day of December, 1894, and the 1st day of November, 1893, M. C. Doran and Mrs. M. C. Doran performed certain labor for and on behalf of the defendant, and furnished to the employes of the defendant, at defendant's special instance and request, certain board, food, and lodging, and goods, wares, and merchandise, to the value of and in the amount of $5,825.60, no part of which has ever been paid."

* * * * * * * * * * *

As a statement of a cause of action for labor performed, the complaint is clearly insufficient, in that it fails to allege that the labor was performed at defendant's request. It may have been the pleader's intention to apply the clause, "at defendant's special instance and request," to the clause containing the allegation of labor performed, as well as to the charge for board, food, lodging, etc.; but this intention is not manifested by the position which this clause occupies in the sentence. There is therefore not sufficient of substantive allegation to support the complaint in this respect. Chit. Pl. p. 359; Boone, Code Pl. § 195; *Wilkins v. Stidger*, 22 Cal. 232; *Bassford v. Swift* (Sup.) 39 N. Y. Supp. 337.

* * *

Nor are the allegations sufficient to support a judgment for food, board, and lodging, and goods, wares, and merchandise, furnished to defendant's employes at its request. It is not necessary to alleged a promise to pay where the facts as alleged imply a promise, as where the board, food, lodging, etc., are furnished to defendant upon request; but where the furnishing or delivery is to a third person, upon defendant's request, then, nothing further appearing, no promise on the part of the defendant to pay is implied; for a furnishing or delivery to a third party, though upon defendant's request, does not, as a matter of law, imply an understanding by defendant to pay. The fact of delivery upon defendant's request is consistent with the idea that credit was extended to the person receiving the goods. The relation of employer and employe does not carry with it any obligation upon the employer from which the law implies a promise to pay for the benefits enjoyed by the employe only. Either the express promise should be alleged, or the facts from which it may be implied, as that the credit was extended to the employer, and not to the employe (Chit. Pl. pp. 308, 356); or the allegation should have been made, generally, that the food, board, lodging, and merchandise were furnished to the employer at its request (*Porter v. McClure,* 15 Wend. 187). Let the judgment be reversed, and the cause be remanded, with directions to the district court to sustain the demurrer.

Reversed and remanded.

MINOR v. BALDRIDGE.

Supreme Court of California. 1898.

123 California, 187.

TEMPLE, J.: This action is for money had and received. The only facts alleged in the complaint are that on the 2d day of November, 1895, defendants were indebted to plaintiff in the sum of $1,000 for money had and received by them for the use of plaintiff, no part of which has been

paid. The defendants did not demur, and their answer consists only of a general denial.

* * * * * * * * * * *

On behalf of the corporate defendant it is contended that the evidence, all of which was received over the objections of the defendants was inadmissible under the complaint for three reasons:

(1) No evidence could be received under such complaint, because, as required in the code system of pleading, it does not state a cause of action. It does not state the real facts which constitute the cause of action, but only certain conclusions of law which might result from various actual conditions. Implications of law from various circumstances which are not stated do not constitute the facts which, under our system, must be pleaded.

(2) Admitting that the common counts can be used in code pleading, yet where the reliance, as here, is upon proof of fraudulent representations, the facts constituting the fraud should be set out with some particularity; and where that is not done no proof of fraud can be received; and,

(3) * * * Under such circumstances a complaint in the form of a common count for money had and received cannot be maintained.

1. That the common courts in assumpsit may be used in this state is too well established to be now called in question. The matter was discussed in *Abadie v. Carrillo,* 32 Cal. 172. Two justices expressed the opinion that the use of the common counts was inconsistent with the code provisions which require a party in his pleading to state the facts constituting his cause of action, but they were of the opinion that the practice was too well established to be then held improper. In several cases since then the use of the common counts has been upheld. In *Castagnino v. Balletta,* 82 Cal. 250, 23 Pac. 127, a discussion is had as to the circumstances which will justify its use for the recovery of money due upon express contracts; and section 1042, Greenl. Ev., is cited, as applicable to our system. In *Pleasant v. Samuels,* 114 Cal. 34, 45 Pac. 998, it is said that the common count is good against a general demurrer. In *Shade v. Lumber Co.,* 115 Cal. 357, 47 Pac. 135, the same ruling is made, but it seems to be implied that such a pleading might be held insufficient as against a special demur-

rer that the pleading is ambiguous, uncertain, and unintelligible. There was not demurrer here, and the first point must be overruled.

2. In the absence of a special demurrer, is the common count sufficient to justify the court in receiving evidence, when the objection is made that the facts constituting the alleged fraud are not set out? In answer I think it must be held, under the authorities, that such a pleading is sufficient.

At common law the common count for money had and received could be used to recover money obtained by false and fraudulent representations. 1 Chit. Pl. p. 364. In *Moses v. Macferlan*, 2 Burrows, 1005, Lord MANSFIELD said: "One great benefit which arises to suitors from the nature of this action is that plaintiff need not state the special circumstances from which he concludes that, *ex æquo et bono*, the money received by the defendant ought to be deemed to belong to him. He may declare generally that the money was received to his use, and make out his case at the trial. This kind of action to recover back money which ought not in justice to be kept is very beneficial, and therefore much encouraged. It lies for money paid by mistake, or upon a consideration which happens to fail, or extortion, or oppression, or an undue advantage of the plaintiff's situation contrary to the laws made for the protection of persons under those circumstances."

The mode of pleading is inconsistent with our code, and may be a matter of regret that it was ever tolerated, but the innovation is not so great if it must fall before a special demurrer, which is like a motion to require a pleader to make his pleading more definite, which practice prevails in some states.[1]

* * * * * * * * * * *

[1] COMMON COUNT AT COMMON LAW AS FOLLOWS:

"Whereas, on — day of —, the defendant was indebted to plaintiff in the sum of ——, for money by the said defendant, before that time had and received to and for the use of said plaintiff, and being so indebted the said defendant, in consideration thereof, on the same day and year last aforesaid, undertook and promised to pay to the said plaintiff the said sum of money when he, the said defendant, should be thereunto afterwards requested.

"Nevertheless the said defendant, although often requested so to do, has not paid the said sum of money or any part thereof, to the said plaintiff, but has hitherto wholly refused, and still does refuse, to the damage of the said plaintiff of —— dollars." 3 Burrill Pl., 248, 249.

Many courts have criticised the use of the common counts: Thomson v. Town of Elton (1901), 109 Wis. 589; Kimball v. Lyon (1893), 19 Colo. 266; Pioneer Fuel Co. v. Hager (1894), 57 Minn. 76; Penn. Mutual Life Ins. Co.

(b) In Tort Cases.

CHICAGO AND ERIE RAILROAD COMPANY v. LAIN.

Supreme Court of Indiana. 1907.

170 Indiana, 84.

MONKS, C. J.: Action by appellee for personal injuries. The complaint set out in the transcript is in five paragraphs. The third and fifth paragraphs were withdrawn,

v. Conoughy (1898), 54 Neb. 123; Hammer v. Downing (1901), 39 Ore. 504. But the rule is established beyond question that the common counts are good under the code.

As to when the common counts will lie, the Supreme Court of Missouri, in Clifford Banking Co. v. Donovan Commission Co. (1905), 195 Mo. 262, said:

"The action for money had and received has always been one favored in the law and the tendency is to widen its scope—it being a flexible form of action, levying tribute on equitable, as well as strictly legal doctrines; so that it has become axiomatic that the action lies where 'the defendant has received or obtained possession of the money of the plaintiff, which, in equity and good conscience, he ought to pay over to the plaintiff. (2 Greenleaf on Ev. (16 Ed.) sec. 117.) The same author says (sec. 118.): 'In regard to *things treated as money*, it has been held that this count may be supported by evidence of the defendant's receipt of bank notes; or promissory notes; or credit in account, in the books of a third person; or a mortgage, assigned to the defendant as collateral security, and afterwards foreclosed and bought in by him; or a note payable in specific articles; or any chattel.'

"In Wilson v. Turner, 164 Ill. l. c. 403 (Mr. Justice Craig delivering the opinion of the court), it was said: 'An action for money had and received will lie whenever one person has received money, which, in justice, belongs to another, and which, in justice and right, should be returned.' In Allen v. Stenger, 74 Ill. 119, in discussing this question, the court said (p. 121): 'Assumpsit always lies to recover money due on simple contract. And this kind of equitable action to recover back money which ought not, in justice, to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex aequo et bono*, the defendant ought to refund. (Chitty on Contracts, 474.) When, therefore, according to this rule, one person obtains the money of another which it is inequitable or unjust for him to retain, the person entitled to it may maintain an action for money had and received for its recovery. And it is not necessary that there should be an express promise, as the law implies a promise. The scope of the action has been enlarged until it embraces a great variety of cases, the usual test being, does the money, in justice, belong to the plaintiff, and has the defendant received the money, and should he, in justice and right, return it to the plaintiff.'

"It is not necessary to allege a promise to pay, nor is privity of contract required. The law implies the privity. (Tamm v. Kellogg, 49 Mo. 118.) In this behalf, the language of Parker, C. J., in Hall v. Marston, 17 Mass. 574, quoted approvingly by Goode, J., in Richardson v. Drug Co., 92 Mo. App., 534, is to the point, thus: 'There are many cases in which that action is supported (assumpsit for money had and received) without any privity

and a demurrer "for want of facts" to the other paragraphs was overruled. Trial and judgment in favor of appellee.

The errors assigned call in question the action of the court in overruling the demurrer to each of paragraphs 1, 2, and 4 of complaint.

The cause was tried by the court and the parties upon the theory that the first paragraph of the complaint was under the second clause and the second and fourth paragraphs were under the fourth clause of section 1 of the employer's liability act of 1893 (Acts 1893, p. 294, c. 130), being section 7083, Burns' Ann. St. 1901.

The part of said act necessary to be considered in the determination of this case reads as follows: "That every railroad * * * operating in this state shall be liable for damages for personal injury suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases: * * * Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employe at the time of the injury was bound to conform, and did conform. * * * Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any * * * locomotive engine or train upon a railway."

It appears from the first paragraph of the complaint that appellee was engaged to work for appellant as a "yard and bridge man;" that one Eggleston was foreman of the switch yards, with authority to direct appellee; and that he directed him "to go to the end of one of the freight cars used in hauling bridge timbers standing on one of said switch tracks and push it to another place on which it was standing." It is not averred that the order was negligent, nor are any facts alleged from which the court can say that it was a negligent order.

The negligence attempted to be charged against said foreman in said paragraph was that he "negligently and

between the parties other than what is created by law. Whenever one man has in his hands the money of another, which he ought to pay over, he is liable to this action, although he has never seen or heard of the party who has the right. When the fact is proved that he has the money, if he cannot show that he has legal or equitable ground for retaining it, the law creates the privity and the promise.' "

carelessly, and without any warning to the plaintiff, and without placing or sending out any flag or signal, and without giving any signal to warn the person in charge of the switching engine to not come onto the track where the plaintiff was at work, or to slacken the speed and move slowly and cautiously on said track, and without warning them that the plaintiff was at the place where he was directed to go, directed and permitted the locomotive engine belonging to defendant and operated by its employes to come onto said track at a careless rate of speed with a car attached, and allowed the men in charge thereof to carelessly detach said car from said engine, and, without any notice or warning, to force said detached car to run with rapidity and force onto said switch and against and upon plaintiff."

The general rule is that, if a person seeks to maintain an action under the employer's liability act, he must state specially all the facts necessary to bring himself within its provisions, and thus enable the court to judge whether he has a cause of action under the statute. *American, etc., Co. v. Hullinger,* 161 Ind. 673, 687, and cases cited; *Indianapolis, etc., Transit Co. v. Foreman,* 162 Ind. 85, 96, 102 Am. St. Rep. 185, and cases cited; *Laporte Carriage Co. v. Sullender,* 165 Ind. 290, 297. Said first paragraph is insufficient, for the reason that it fails to show that a duty devolved upon said foreman to exercise care for the safety of appellee.

In *Muncie Pulp Co. v. Davis,* 162 Ind. 558, 652, this court said: "In every case involving actionable negligence there are necessarily three elements essential to its existence: (1) The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; (2) a failure by the defendant to perform that duty; and (3) an injury to the plaintiff from such failure of the defendant. When these elements are brought together, they unitedly constitute actionable negligence. The absence of any one of these elements renders a complaint bad or the evidence insufficient. See, also, *Evansville, etc., R. Co. v. Griffin,* 100 Ind. 221, 50 Am. Rep. 783; *Louisville, etc., R. Co. v. Sandford,* 117 Ind. 265; *Daugherty v. Herzog,* 145 Ind. 255, 32 L. R. A. 837, 57 Am. St. Rep. 204; *American Rolling Mill Co. v. Hullinger,* 161 Ind. 673; Black, Proof and Pl. in Accident Cas., § 138. In pleading the characterization of an act or omission as negligent causes that word

to take on a technical significance, but such a charge will not supply averments of fact from which the existence of a duty to exercise care is shown to have existed. * * * It cannot be said to be a proposition of law that the giving of a proper command by a superior servant in every instance imposes upon him the duty of protecting the servant commanded while the latter is engaged in the execution of the order. See *Southern Ind. R. Co. v. Martin*, 160 Ind. 280."

It was said by this court in *Pittsburgh, etc., R. Co. v. Lightheiser*, 163 Ind. 247, 251, 252, 219: "It is well settled that a complaint for negligence must disclose by proper averments the existence of a duty upon the part of the defendant, or of the person alleged to be negligent, where it is a case of imputed negligence, as under an employer's liability act to exercise care toward the person injured. *Muncie Pulp Co. v. Davis* (1904), 162 Ind. 558, 561, 563; *American Rolling Mill Co. v. Hullinger* (1904), 161 Ind. 673; *Faris v. Hoberg* (1892), 134 Ind. 269, 39 Am. St. Rep. 261; *Louisville, etc., R. Co. v. Sandford* (1888), 117 Ind. 265; *Zimmerman v. Baur* (1894), 11 Ind. App. 607. The direct statement that it was the duty of a defendant to do or not to do a certain act is a mere conclusion of law. The rule is that facts must be alleged from which the law will imply the existence of the underlying duty. *Indianapolis, etc., Transit Co. v. Foreman* (1904), 162 Ind. 85, 102 Am. St. Rep. 185, and cases cited; *Seymour v. Maddox* (1851), 16 Q. B. 326; *Brown v. Mallet* (1848), 5 C. B. 599, 57 Eng. C. L. 598; *City of Buffalo v. Holloway* (1852), 7 N. Y. 493, 57 Am. Dec. 550; *West Chicago St. R. Co. v. Coit* (1893), 50 Ill. App. 640. And see *Hopper v. Covington* (1886), 118 U. S. 148, 6 Sup. Ct. 1025, 30 L. Ed. 190." See, also, *Pittsburgh, etc., R. Co. v. Peck*, 165 Ind. 537, 540, 541, and cases cited; *Chicago, etc., R. Co. v. McCandish*, 167 Ind. 648, 651-653; 4 Elliott on Railroads (2d Ed.) § 1689f.

It is not averred in said first paragraph that said foreman knew that appellee had in conforming to said order assumed a dangerous position, or that a compliance with said order required him to assume such position, nor are any facts averred from which we can say that in the exercise of ordinary care he ought to have known that appellee had assumed such position. Neither is it averred that said foreman knew appellee was in a place where it would be

dangerous to him for the foreman to order or permit a car to come on said switch track. Unless said foreman knew, or under the facts and circumstances ought in the exercise of ordinary care to have known, that appellee was in a place where he would be injured if the car was to run onto said switch track, he violated no duty he owed appellee in permitting or directing said car to be so placed, and such act was not, as against appellee, a negligent act. Said foreman at the time and place represented appellant in giving said order to appellee, and whatever duty said foreman owed at that time was the measure of appellant's duty to him.

There is no direct averment that it was the duty of said foreman under the terms or practice of his employment, or made so by any rule or usage of appellant, "to warn" appellee, or "place or send a flag or signal," or "to warn or give any signal to the person in charge of said locomotive engine" in regard to going onto said switch track. Nor are any facts alleged from which we can say said foreman owed appellee any such duty. What is alleged on that subject is by way of recital only. Such facts must be alleged directly and positively. It avails nothing as against a demurrer for want of facts to aver conclusions or plead facts by way of recital. *Indianapolis, etc., Transit Co. v. Foreman, supra,* and cases cited; *Indiana, etc., R. Co. v. Adamson,* 114 Ind. 282, 284; 4 Elliott on Railroads (2d Ed.) §§ 1689a, 1689b.

The negligence charged in the second and fourth paragraphs of the complaint was of the persons in charge of the locomotive engine, "that they carelessly and negligently, and without giving any signal, notice, or warning of their intention to do so, ran said locomotive engine at a reckless and high rate of speed with a freight car attached in and upon said switch track where plaintiff was engaged at work, and negligently and carelessly disconnected said freight car therefrom, leaving it to run at a rapid speed with great force upon said switch track, against other cars standing on said track and forced said cars against him," etc.

Said paragraphs are insufficient because they fail to show by the averment of proper facts that appellant or the person in charge of said locomotive engine owed any duty to appellee at the time and place where he was injured. The rule is well settled that, in an action to recover for a per-

sonal injury of a person on account of negligence, it is essential that the complaint contain an allegation or statement of the facts from which it appears that the defendant owed a duty to the plaintiff, and that the defendant negligently performed or negligently failed to perform such duty. *Pittsburgh, etc., R. Co. v. Peck, supra,* and cases cited.

There is nothing in the facts alleged in said second and fourth paragraphs showing that it was the duty of the person in charge of said locomotive engine to give any "signal, notice, or warning" before, or at the time of, running said locomotive engine and freight car upon said switch track. If this duty arose from any facts or circumstances, or out of any rule or rules of appellant company, or out of any orders or directions given by it, or from anything that required the person in charge of said locomotive engine to give such "notice, warning, or signal," the same should have been directly and positively alleged. If said paragraphs disclosed such duty, then under a well-settled rule a violation or breach thereof may be shown by a general allegation of negligence. A general allegation of negligence, however, is not sufficient to show both a duty and a violation thereof. *Pittsburgh, etc., R. Co. v. Peck, supra,* and cases cited. What we have said and the authorities cited, concerning the insufficiency of the first paragraph of complaint, apply with equal force to said second and fourth paragraphs.

It follows that the court below erred in overruling the demurrer to said first, second, and fourth paragraphs of the complaint.

Judgment of the Fulton Circuit Court is reversed, with instructions to sustain the demurrer to said paragraphs, and for further proceedings not inconsistent with this opinion.

FULLER v. ILLINOIS CENTRAL RAILROAD COMPANY.

Court of Appeals of Kentucky. 1910.

138 Kentucky, 42

Opinion of the court by Chief Justice BARKER—affirming.

The appellant, B. F. Fuller, while engaged as a section hand in moving a railroad frog from one point of appellant's track to another, was injured by having his hand mashed. To recover damages for this injury he instituted this action in the Hopkins Circuit Court. A general demurrer was interposed by defendant to the petition and sustained by the court, whereupon the plaintiff (appellant here) refused to amend, and his petition was dismissed. From this judgment he has appealed.

* * * * * * * * * * *

The rule is well settled in this state that, while a plaintiff may charge in his petition in general terms that his injuries were caused by the negligence of the defendant and these general allegations will be sufficient on demurrer, yet it is equally well settled that if the plaintiff undertakes to circumstantially detail the facts of his injuries, and the facts as stated do not constitute a cause of action, the mere addition that the injuries were caused by the negligence of the defendant will not cure the defect shown by the facts as stated. The plaintiff with great circumstantiality has set out all that took place at the time he was injured. The gravamen of the charge is that the defendant's foreman, who was plaintiff's superior, ordered a gang of section hands, of which plaintiff was one, to lift with their hands a large railroad frog from the place where it was situated and put it upon the railroad track, then slide it along the rail some 30 or 40 feet to a point where it was again to be put in position and used as a railroad frog. The plaintiff does not allege that the men set to do this work were not sufficient in number to do it with reasonable safety; nor does he allege that any of the men were unskilled in the work at which they were set, or in any wise incapable or unfit to discharge the duties attendant upon its execution; nor does he by any allegation negative the inference that

his injury was caused by the carelessness or negligence of his fellow servants. He does not state why or how the frog slipped or fell off the rail, but merely alleges that it did so, and that his hand was caught under it and mashed. All this may be true, and yet the master not liable for the resulting damage. Under the well-known principle of pleading, that every intendment is taken against the pleader, we must assume that the men engaged in lifting and moving the frog were sufficient in number to do the work with reasonable safety; that they were reasonably skillful and fitted for the work to be done; and that the slipping of the frog from the rail was not caused by any negligence for which the master was responsible. These defects in the petition are not aided by the general allegation that the plaintiff's injury was caused by the negligence or the gross negligence of the defendant. All that plaintiff was entitled to from his employer was that a sufficient number of men should be furnished to move the frog with reasonable safety, and that these men should be reasonably fitted and disciplined to do the work at which they were set. In a general sense it may be affirmed that all railroad work is more or less dangerous; and it is well settled that the ordinary dangers of the business are assumed by the employes who undertake to carry it on. The employer does not insure an employe against injury in the performance of his duties. If he furnishes him a reasonably safe place in which to work, reasonably safe material with which to work, and, where he is engaged with others, sees to it that the coemployes are sufficient in number to do the work in hand in a reasonably safe manner, and are reasonably fitted for and skilled in the performance of the joint duty, this is all that the employe has a right to expect or demand. The petition under the rule of pleading above stated constructively shows that all these duties were performed by the employer, and the conclusion is therefore irresistible that his injury was caused by the danger or risk inherent in the business, and which he therefore assumed when he undertook it.

Judgment affirmed.

CITY OF LOGANSPORT v. KIHM.

Supreme Court of Indiana. 1902.

159 Indiana, 68.

DOWLING, C. J.: The appellee recovered a judgment against the appellant for damages for an injury by a fall from a bicycle, alleged to have been occasioned by a defect in an improved street in the city of Logansport, in this state. The sufficiency of each of the two paragraphs of the complaint was questioned by demurrers for want of facts. The ground of objection to the first paragraph is that it is not shown by proper averment that the injury was caused by the defect in the street; and to the second, that it fails to state wherein the grade of the street on which the accident occurred was improper. The point made against the first paragraph seems to be well taken. It is averred that the street was paved with brick, and that the appellant had negligently suffered it to get out of repair, and to become worn by travel, and sunken at a certain point so that a hole had formed four inches in depth, two feet in width, and three feet long; three sides of such hole sloping outward, and the east end thereof being nearly perpendicular. It is then alleged "that when she [appellee], was riding her bicycle as aforesaid upon said street, *she approached the said street, so out of repair as aforesaid, from* the west end, traveling toward the east, using care and caution, and having full control of her wheel while so doing, and traveling at a reasonable rate of speed; that while so traveling as aforesaid, using care and caution, and having no knowledge of the defect in said street as aforesaid, and not seeing the same, and, on account of the character of the defect, it was such that it could not be seen in time to avoid her injury hereinafter set out, she, riding her wheel as aforesaid, struck said defective, unsafe, and out of repair street, and by reason of said street being out of repair as aforesaid, defective, and unsafe, she was thrown violently from her bicycle upon the brick pavement of said street," etc. It does not appear that the appellee "struck" the street at or near the defective part thereof, or that her bicycle struck the dangerous cavity, or that it

ran into or across the hole, or that the hole in the street had any connection whatever with the accident. The appellee struck the defective street when she entered it, as she alleges, at some point near its west end; but it is not shown where she came upon it, nor how far from the hole described in the pleading. The street may have been half a mile or a mile or more in length. The averment "that, by reason of the street being out of repair, she was thrown from her bicycle," leaves the cause of her accident entirely to conjecture. Was she attempting to guide her bicycle around the obstruction? Or did she stop it suddenly to avoid running into it? Did she ride into the defective place in the street, and did the fall or obstruction cause the bicycle to turn over? Or did she attempt to leap from the wheel when she found she could not steer it around the dangerous spot? None of these questions is answered by the first paragraph of the complaint. While the paragraph describes a specific defect in the street, and alleges that the accident occurred by reason of that defect, it wholly fails to show that the defect in the street was the proximate cause of the accident and injury, or how or in what manner the accident was occasioned by it.

It is said in *City of Connersville v. Connersville Hydraulic Co.*, 86 Ind. 235, 236, that: "Uncertainty is not, as a general rule, cause of demurrer; but there are cases where a pleading is so vague as not to state a cause of action or defense, and in such cases a demurrer will lie. *Lewis v. Edwards*, 44 Ind. 333; *Lane v. Miller*, 27 Ind. 534; *Snowden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 370. * * * While the rule in favor of pleadings assailed by demurrer on the ground of uncertainty is a liberal one, it does not by any means go to the extent of dispensing with reasonable certainty. This the rule could not do without contravening the express provisions of the code, and thus subverting settled principles of law."

The rule at common law is thus stated in 1 Chit. Pl.: "The principal rule as to the mode of stating the facts is that they must be set forth with *certainty*, by which term is signified a clear and distinct statement of the facts which constitute the cause of action on ground of defense, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and the court who are to give judgment." This rule

has been substantially incorporated in the civil code of this state. Section 341, Burns' Rev. St. 1901 (section 338, Rev. St. 1881; section 338, Horner's Rev. St.).

The case of *Corporation of Bluffton v. Mathews,* 92 Ind. 213, states the rule thus: "To render the appellant liable, it was necessary to show in the complaint, by the averment of issuable facts, a wrong on the part of the appellant, and damage to the appellee, and that the wrong was the proximate cause of the damage. The complaint did not show that when the appellee was injured the appellant was chargable with fault, or that her injury was caused by the appellant's wrongful act or omission."

In *Railroad Co. v. Conn.,* 104 Ind. 64, 68, it is said: "It is not enough in such a case as this to charge the defendant with negligent acts, whether of commission or omission; but it must also be shown with reasonable certainty that such acts were the direct or proximate cause of the accident on injury, or the complaint must be held bad on demurrer for want of sufficient facts." See, also, *Pennsylvania Co. v. Hensil,* 70 Ind. 569, 36 Am. Rep. 188; *Pennsylvania Co. v. Gallentine,* 77 Ind. 322; *Enochs v. Railroad Co.,* 145 Ind. 635, 16 Am. & Eng. Enc. Law (1st Ed.), 428, 431; 14 Enc. Pl. & Prac. 336.

The allegation "that by reason of said street being out of repair as aforesaid, defective, and unsafe, she was thrown violently from her bicycle," is a conclusion of the pleader. The facts stated do not justify the inference made from them. *City of Logansport v. La Rose,* 99 Ind. 117, 128; *School Tp. v. Farlow,* 75 Ind. 118, 120; *Boyd v. Olvey,* 82 Ind. 294, 296, 297; *Krug v. Davis,* 85 Ind. 309, 311.

The second paragraph of the complaint contains all of the averments of the first, with the further allegation that the grade of the street, from its crown to the curbing on each side, was so steep and great as to be dangerous to persons riding bicycles, and that it had been in this state for a considerable time, as the plaintiff and its officers knew, but that the appellee was ignorant of its condition. The fact that the street was dangerous to persons riding bicycles, because of its steep slope or grade from its middle line to the curbing, is probably averred with sufficient certainty; but it does not appear that the bicycle slipped or became unmanageable in consequence of the abruptness of the slope, or that the nature of the grade of the street caused

or contributed to the accident. This paragraph, in its description of the accident, is quite as indefinite as the first. In almost the same words it alleges that the appellee "struck the defective * * * street" somewhere west of the hole, "and by reason of the said dangerous and unsafe grade of said street, and being out of repair as aforesaid, she was thrown violently from her bicycle," etc. The fault of this paragraph, like that of the first, is not mere uncertainty. It fails to connect the alleged negligence of the appellant with the injury sustained by the appellee. Such connection between the condition of the street and the accident to the appellee not being shown, the paragraph does not state a cause of action against the appellant.

Other errors are assigned and discussed, but it is not necessary to consider them.

Judgment reversed, with instructions to the court to sustain the demurrer to each paragraph of the complaint, and for further proceedings not inconsistent with this opinion.

COLORADO SPRINGS CO. v. WIGHT.

Supreme Court of Colorado. 1908.

44 Colorado, 179.

Mr. Justice MAXWELL delivered the opinion of the court:

This was an action at law to recover damages alleged to have been sustained by plaintiff by reason of misrepresentations made by defendant as to the width of a certain street which bounded on one side two city lots which defendant sold to plaintiff.

The complaint alleged the corporate existence of defendant, its ownership of the lots, the purchase of the lots by plaintiff, through the Davie Realty Company, as defendant's agent, and then proceeded:

"That the Davie Realty Company represented to the plaintiff that San Miguel street, bounding said property on the south side thereof, was 100 feet wide throughout its entire extent and where the same adjoins said property, as

aforesaid. That such representation was specially authorized by the defendant, and was, in respect to the width of the street, believed and wholly relied upon by the plaintiff, who at the time did not know what the facts were in relation thereto, and the plaintiff was thereby influenced and induced to consummate the purchase of said property and to pay said sum of $2,750 therefor. That said representation is and was untrue, but plaintiff was not aware of the falsity thereof until a long time thereafter and until after she had taken possession of said property and had improved the same by the erection of two dwelling houses thereon of great value."

The complaint then alleged that San Miguel street, where it adjoins the lots, is only 50 feet wide, and that by reason thereof the lots were only worth $1,750, instead of $2,750, the price paid.

A general demurrer was interposed to the complaint, which, having been overruled, defendant answered.

A jury trial resulted in a verdict and judgment for plaintiff, to reverse which is this appeal.

The general demurrer attacked the complaint upon the ground that it did not allege that the representations made by defendant to plaintiff, upon which she relied and which induced plaintiff to make the purchase, were made by the defendant with knowledge of their falsity, and were made with the intention that they should be acted upon and for the purpose of inducing plaintiff to enter into the contract.

The same proposition, in effect, was presented in instructions requested by defendant and refused. The rulings upon the demurrer and the refusal to instruct as requested are assigned as error.

Sellar v. Clelland, 2 Colo. 532, was an action to recover damages sustained by plaintiffs, by reason of certain false representations made by defendants to plaintiffs as to the condition of a certain road or trail over which plaintiffs contracted with defendants to haul certain freight. It was there held (page 544):

"In regard to representations generally, I conceive it to be necessary for the party relying on the representations to show not only that they are false, but that the party making the same knew them to be false. But, when one has made a representation positively, or professing to speak as of his own knowledge on the subject, the intentional

falsehood is disclosed, and the intention to deceive is also inferred, or, at all events, this is so when the matters falsely represented are peculiarly within the knowledge of the party making them, and are not known to the party to whom they are made. In such a case the proof would seem to be complete when it was shown that the defendants made the representations; that they were made to induce plaintiffs to enter into the contract; that, relying upon the same, they did enter into the contract; that the representations were false; that the plaintiffs sustained damage; and that such damage was occasioned by reason of the falsity of such representations"—citing a large number of cases.

In *Wheeler v. Dunn,* 13 Colo. 428, 436, it was said:

"It is said in Bigelow on Frauds, 466, that a fraudulent misrepresentation is made up of five elements: (1) A false representation. (2) Knowledge by the person who made it of its falsity. (3) Ignorance of its falsity by the person to whom it was made. (4) The intention that it should be acted upon. (5) Acting upon it, with damage. An action at law for damages for deceit requires all these elements. In equity a case may be made without the second, and sometimes without the fifth. Very nearly the same enumeration of the elements going to make up a fraudulent misrepresentation is given in 2 Pom. Eq. Jur. 357."

Pomeroy lays down this rule (2 Pom. Eq. Jur. 357): "A misrepresentation, in order to constitute fraud, must contain the following essential elements: (1) Its form as a statement of fact. (2) Its purpose of inducing the other party to act. (3) Its untruth. (4) The knowledge or belief of the party making it. (5) The belief, trust, and reliance of the one to whom it is made. (6) Its materiality."

The same rule is announced in *Lahay v. City Nat. Bank,* 15 Colo. 330, and *Connell v. El Paso G. M. & M. Co.,* 33 Colo. 30

The rule is thus stated in 8 Enc. Pl. & Pr. p. 901:

"As a general rule, false representations not being fraudulent or actionable, unless made with knowledge of their falsity, or stated as the truth when the person has no knowledge of their falsity, or stated as the truth when the person has no knowledge on the subject, scienter must be expressly alleged in a declaration or complaint for false rep-

resentation and deceit, or specific allegations must be used which sufficiently import knowledge." And cases cited.

The specific allegations referred to in the last above quotation which will import knowledge upon examination of the cases cited are found to be allegations to the effect that the defendant falsely and fraudulently represented, etc.; it being held that the word "fraudulently" included the scienter. An examination of that part of the complaint bearing upon this subject, above quoted, which contains the gravamen of the cause of action alleged, discloses that it is insufficient in not alleging defendant's knowledge of the falsity of the representations made by it to plaintiff, and in not alleging that the representations were made for the purpose of inducing plaintiff to purchase the property; nor are there any allegations found in the complaint which supply these deficiencies.

* * * * * * * * * * *

The court erred in overruling the demurrer to the complaint and in refusing to instruct the jury as requested by defendant, for which reasons the judgment must be reversed and the cause remanded to the court below, with instructions to allow plaintiff to amend her complaint as she may be advised.

Reversed and remanded.

Chief Justice STEELE and Mr. Justice HELM concur.

WENDLING LUMBER COMPANY v. GLENWOOD LUMBER COMPANY.

Supreme Court of California. 1908.

153 California, 411.

ANGELLOTTI, J.: * * * The complaint was in the form ordinarily used in an action for the conversion of personal property, simply alleging the ownership and right to possession by plaintiff of the property on a day named, the wrongful deprival and conversion to its own use of said property by defendant on that day, the market value of said property, a demand for the return of the property, and a refusal by defendant to comply therewith, the consequent

damage, and nonpayment of any part thereof. By its answer defendant simply denied each of the allegations of the complaint, except the one as to the value of the property, which it admitted, to the extent of $4,856.40, which was the amount of the verdict.

The theory of plaintiff's case was that one J. H. Routt, not a party to this action, had obtained such property from plaintiff, by means of certain false representations, willfully made for that purpose, relying upon which plaintiff sold and delivered the property to Routt, that defendant received the property from Routt without giving any valuable consideration therefor, and with full knowledge of the fraud by means of which the same had been obtained, and that plaintiff, upon discovering the fraud, at once repudiated the sale, and, treating it as void because of the fraud, commenced this action for the wrongful conversion of the property. Over the objection of defendant plaintiff was permitted to introduce evidence in support of this theory. It is the admission of this evidence that is alleged to have been erroneous. The objection urged is that, no fraud being alleged in the complaint, the evidence of fraud was incompetent under the pleadings, defendant resting upon the general rule that where fraud is relied on by a party, he must allege it. We are satisfied that this rule is not applicable here. It appears to be thoroughly established that, where a sale of personal property is procured by fraud, the ownership of the property is not changed, and no title passes to the vendee, and the vendor retains his right in the property, unless, after discovering the fraud, he assents to and ratifies the act of sale, either positively or by such delay as would authorize the inference of assent. See *Butler v. Collins,* 12 Cal. 457, and *Amer v. Hightower,* 70 Cal. 440, 11 Pac. 697, and authorities therein cited. As was said in *Butler v. Collins, supra,* and approvingly quoted in *Amer v. Hightower, supra,* "the civil remedies of the party defrauded are clear, viz., trover or replevin in the *detinet,* or trespass or replevin in the *cepit,* at his election." One who acquires the property from the fraudulent vendee under such circumstances that he cannot be held to be a purchaser in good faith and for a valuable consideration is in no better position than the fraudulent vendee, and the defrauded party has the same remedies against him that he had against such fraudulent vendee. See *Sargent v. Sturm,*

23 Cal. 359, 83 Am. Dec. 118. It seems clear that in an action brought upon the theory that the vendor is the owner and entitled to the possession of the property, and that the defendant unlawfully withholds possession thereof, or has converted the same to his own use, the general allegations of ownership and right to possession, and unlawful withholding or conversion are sufficient, and will render admissible proof of any facts sustaining such claim. It is elementary that a plaintiff is not required to anticipate in his complaint any defense that may be made by the defendant. See *Canfield v. Tobias,* 21 Cal. 349. The fact that a defendant owns and holds the property claimed because of a valid sale, or because he acquired the same from a fraudulent vendee, in good faith and for a valuable consideration, is purely a matter of defense, and when in such an action a defendant asserts any such claim, plaintiff can meet it by proof that such sale was void because of fraud, without having made any allegation of fraud in the complaint. This is illustrated by the case of *Moore v. Copp,* 119 Cal. 429, 51 Pac. 630, an action to quiet title to land, where the defendant set up in defense an agreement of sale, and plaintiff was allowed to introduce evidence in rebuttal, showing that such instrument was obtained by fraud, without having alleged fraud in the complaint. The court, after saying that plaintiff could not know, when filing the complaint, that the defendant would answer, nor that, if he did, he would claim under the instrument in question, said that the principle governing the case was that stated in *Sterling v. Smith,* 97 Cal. 343, 32 Pac. 320, as follows: "No doubt, when a cause of action rests upon fraud, the facts constituting the fraud must be set up in the complaint; but such was not the case here, for the necessity of proving fraud appeared only after the answer of the defendant. And a plaintiff is in that position with respect to all new matters set up in the answer." The same is, of course, true as to the matters disclosed by evidence, in behalf of a defendant, properly given under denials contained in the answer. It is not correct to say, in a case of the character before us, that the plaintiff's cause of action rests upon fraud. It rests upon his ownership of the property, and the conversion thereof by defendant, and fraud comes in only in reply to the defense that defendant is the owner by reason of an alleged sale by the plaintiff. Technically, proof of

fraud as to such sale was not a part of plaintiff's *prima facie* case, and was available only in reply to any claim of defendant based on the sale, but this was a mere matter of order of proof. It is the general rule that, in actions for the conversion of personal property, where the property has been procured by fraud, it is not necessary to allege the fraud, but it is sufficient to declare generally that the property was wrongfully converted. See 21 Ency. of Plead. & Prac. 1087; *Salisbury v. Barton*, 63 Kan. 552, 66 Pac. 618; *Pekin Plow Co. v. Wilson.* 66 Neb. 115, 92 N. W. 176; *Hunter v. Hudson River Co.*, 20 Barb. (N. Y.) 493; *Bliss v. Cottle*, 32 Barb. (N. Y.) 323; *Benesch v. Waggner*, 12 Colo. 534, 21 Pac. 706, 13 Am. St. Rep. 254.

* * * * * * * * * * *

PAINE v. BRITISH-BUTTE MINING COMPANY.

Supreme Court of Montana. 1910.

41 Montana, 28.

Mr. Justice HOLLOWAY delivered the opinion of the court.

A demurrer having been sustained to the third amended complaint filed in this action, and plaintiffs, having declined to plead further, suffered judgment to be rendered and entered against them, and appealed to this court.

The complaint in question alleges that the plaintiffs are copartners, doing business as Paine, Webber & Co.; that the defendant is a corporation having its principal office in Butte, with its president and secretary residing there; that it has a capital stock, represented by shares evidenced by stock certificates, and that the president and secretary are authorized to make transfers of stock upon the records of the corporation. It is then alleged that on February 1, 1908, N. J. Lloyd and Burt Adams Tower each owned 2,500 shares of the capital stock of the defendant company, and each held a certificate evidencing his ownership. The complaint then contains this allegation: "(5) That on the 1st day of February, 1908, the said Lloyd and Tower for a valuable consideration transfered and assigned the said

shares of stock and the certificates representing the same in blank, and delivered the same and the whole thereof to these plaintiffs, who thereby became and were owners and holders thereof, and entitled thereto, and entitled to have the same transferred upon the books of the said defendant company." It is further alleged that plaintiffs presented the said certificates to the officers of the defendant company, at its office in Butte, and demanded that the stock be transferred of record and new certificates issued to plaintiffs in lieu of the certificates so presented; that the defendant and its officers neglected and refused to make such transfer or to issue or deliver to plaintiffs new certificates representing the shares of stock so sought to be transferred, and by reason of such refusal the defendant company thereby converted such shares of stock to its own use. The complaint then sets forth the damages which plaintiffs have sustained by reason of the alleged conversion, and concludes with the usual prayer. The demurrer attacks the complaint on the ground, among others, that it is ambiguous and uncertain. The order of the court is a general one, and if any ground to the demurrer will justify the court's ruling, it must be sustained.

In an action for conversion the plaintiff must allege a general or special ownership in the property and a right to the immediate possession of it at the time of the conversion. *Raymond v. Blancgrass,* 36 Mont. 449, 93 Pac. 648, 15 L. R. A. (N. S.) 976; *Harrington v. Stromberg-Mullins Co.,* 29 Mont. 157, 74 Pac. 413. "It is sufficient to allege merely that at the time of the conversion the plaintiff was the owner and entitled to the immediate possession of the goods. Such an averment is an affirmation of a fact, and is not open to the objection that it is a mere legal conclusion." 21 Ency. Pleading & Practice, 1063. But the plaintiff is not confined to this particular form of pleading. He may set forth the facts showing his title and right of possession. "Allegations respecting title, being averments of material and traversable facts, must be clear and precise; but certainty to a common intent seems all that is necessary, and it has been held that where the inevitable inference from facts alleged and from all the averments of the pleading construed together is that either realty or personality is the property of a named person, the pleading

is not demurrable by reason of failure to make a clear and specific averment of title." 21 Ency. Pleading & Practice, 715. "Where, however, the pleader sets forth specifically the links in his chain of title, a general allegation of ownership will be treated as a mere conclusion from the facts stated, and will not cure any defect in the chain relied upon." *Gruwell v. Seybolt,* 82 Cal. 7, 22 Pac. 938. If the plaintiff undertakes to deraign his title and follows the facts stated, by the declaration that "thereby" or "by virtue thereof" the plaintiff become the owner, such concluding declaration will not be treated as an allegation of ownership, but as the mere consequences flowing from the facts of deraignment set forth. *Turner v. White,* 73 Cal. 299, 14 Pac. 794; 21 Ency. Pleading & Practice, 719. In other words, under such circumstances the concluding declaration does not add anything whatever of virtue to the pleading, but its sufficiency will be tested by reference to the facts set forth in the deraignment. As against a special demurrer for ambiguity and uncertainty, a complaint is not sufficient which merely alleges facts from which title in plaintiff may be inferable. If the direct allegation of ownership is not employed, then title in plaintiff, as distinguished from title in any one else, must be the inevitable inference from the facts stated. 31 Cyc. 49, 81; 21 Ency. Pleading & Practice, 716.

It is true that the allegations of this complaint are not inconsistent with the idea of plaintiffs' ownership; but that is not sufficient. As was said by this court, in *Becker v. Commissioners,* 11 Mont. 490, 28 Pac. 1116: "But, because the language of a pleading is not inconsistent with a state of facts, that is not alleging such state of facts. The complaint must allege the cause of action, and not simply set up matter which happens not to negative a cause of action. The cause of action must be found in the words of the complaint."

The complaint alleges that Lloyd and Tower for a valuable consideration transferred and assigned their shares of stock, and the certificates representing the same, in blank, and delivered them to plaintiffs. There is not any allegation that the consideration passed from the plaintiffs, nor that the certificates were delivered with the intent to transfer title to plaintiffs; nor, indeed, that they were transferred or assigned to plaintiffs. For the sake of illustration

merely, let us assume that John Doe furnished the money to purchase these certificates and delivered it to plaintiffs with directions to them to purchase the stock for him; that plaintiffs undertook to do so gratuitously; that they purchased the stock for Doe, paying Doe's money for it, and that Lloyd and Tower each thereupon assigned his certificate in blank and delivered it to plaintiffs. Under such circumstances every allegation of this complaint would be literally true, and yet the stock would belong to John Doe, and the plaintiffs would not have any interest in it whatever. This illustration is employed merely to show that under possible circumstances the allegations of the complaint are just as consistent with the idea of ownership in some third person, as with the idea of ownership in plaintiffs themselves. "The pleader is not at liberty to leave his pleading open to different constructions, and then take his choice between them." *Langsdale v. Woollen*, 120 Ind. 78, 21 N. E. 541; 31 Cyc. 72. If the facts are that Lloyd and Tower for a valuable consideration passing to them from plaintiffs assigned their certificates in blank, and delivered them to plaintiffs for the purpose and with the intent of transferring ownership to plaintiffs, then the complaint could properly allege that Lloyd and Tower sold, assigned, and transferred their stock to plaintiffs, and those facts would fully sustain the allegation. There is not any excuse whatever for uncertainty in this pleading. In the complaint now under consideration plaintiffs have made their fourth attempt to state a cause of action which they could have stated by employing the general allegation of ownership and right of possession, in common use in actions for conversion, or the form of allegation indicated above. The language employed by this court in *Becker v. Commissioners*, above, is applicable here: "It was such a simple matter to allege these facts constituting a cause of action—the appellant had such abundant opportunity to allege them, if they were true—and as he refused to do so, apparently with deliberation, it would seem that the pleader considered that he had set out his alleged cause of action as fully as the facts warranted."

We think the complaint is ambiguous and uncertain, and that the district court was fully justified in sustaining the

special demurrer which pointed out the objection we have considered. The judgment is affirmed.

Affirmed.

Mr. Chief Justice BRANTLY concurs.

Mr. Justice SMITH: I dissent. The decision is too technical. In my judgment the allegation that plaintiffs "thereby became the owners and holders thereof," while somewhat in the nature of a conclusion, should be considered as supplementing the preceding allegations. No harm can result from requiring the defendant to answer, thus enabling the court to pass upon the actual facts in the case.

(c) In Equity Cases.

BROWN v. REA.

Supreme Court of California. 1907.

150 California, 171.

SLOSS, J. The plaintiff filed a complaint alleging the following facts: That he is the owner of a lot of land in the city of San Jose, having a frontage of 88.6 feet on North Market street, a public street of the city; that upon this lot there is a building in which plaintiff is carrying on a wholesale grain and produce business, that in the conduct of said business it is necessary to use large drays and wagons to carry the merchandise to and from said premises, and that said trucks and wagons need free and unobstructed access and ingress in and to said premises from Market street. The complaint alleges that the defendants wrongfully and without right threaten and intend to enter Market street, and the part thereof immediately in front of plaintiff's premises, for the purpose of laying ties and rails thereon in the construction of two railroads, each of which will have double tracks, and that the defendants have actually commenced the digging and excavating of the street, and have already made a deep and wide trench therein which greatly obstructs and impedes the traffic on

said street, and that the defendants threaten and intend to continue to tear and excavate the street and the part thereof immediately in front of plaintiff's premises, to lay ties and rails thereon, and, when the same are laid, to permanently run cars and motors thereon; that the occupation and use of said street and the part thereof adjoining plaintiff's premises and business house will irreparably injure and damage plaintiff and will greatly endanger and obstruct the use of plaintiff's premises, and will particularly and irremediably impair the right and easement of access thereto and egress therefrom, and will greatly obstruct, hamper, and impede plaintiff in the carrying on of his business on said premises, and will greatly lessen the value thereof, and will irremediably impair and destroy plaintiff's rights in Market street and his easement of access to and ingress in and to and egress from his said premises; that plaintiff has already suffered damage by reason of the premises in the sum of $1,000. The prayer of the complaint is for said sum of $1,000 and for an injunction restraining the defendants from digging and making any excavation in Market street, or laying ties and rails thereon or running cars thereon for any purpose.

The railroad company and the defendant Elder demurred on the ground that the complaint failed to state facts sufficient to constitute a cause of action. Defendant Rea demurred upon the same ground and further specified certain particulars in which, as he claimed, the complaint was uncertain.

The demurrers being submitted to the court, an order was made sustaining all of them, with leave to the plaintiff to amend within 10 days. No amendment having been made within the time allowed, the defendants had judgment against the plaintiff for their costs. From this judgment the plaintiff appeals.

It is unnecessary to consider any of the special grounds of demurrer urged by the defendant Rea, since we are satisfied that the general demurrers were properly sustained. Apparently the plaintiff attempted in his complaint to allege facts showing a threatened nuisance, the maintenance of which would be especially injurious to him. A nuisance is defined in the Civil Code, § 3479, as "anything which is injurious to health, or is indecent or offen-

sive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway." Section 3480 of the Civil Code defines a public nuisance as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." Generally speaking, a public nuisance does not furnish ground for action by a private person, but such public nuisance may inflict upon an individual such peculiar injuries as to entitle him to maintain a separate action for its abatement, or to recover damages therefor. Civ. Code, § 3493. The injury to the individual must, however, be different in kind and not merely in degree from that suffered by the general public. *Aram v. Schallenberger*, 41 Cal. 449; *Bigley v. Numan*, 53 Cal. 403; *Hogan v. R. R. Co.*, 71 Cal. 87, 11 Pac. 876. Ordinarily an obstruction to a highway, if unauthorized and illegal, is a public nuisance. The injury is to the right to travel upon the highway, which right resides in the public generally. Such obstruction may, however, constitute a private nuisance as well. Every owner of land abutting upon a highway has a right of access from his land to the highway and from the highway to his land. This right of access is an easement, and an obstruction to the highway which at the same time obstructs this easement is a peculiar injury to the abutting landowner and gives him a cause of action. *Hargro v. Hodgdon*, 89 Cal. 623, 26 Pac. 1106.

The plaintiff undoubtedly sought to allege such an obstruction of this easement as would constitute a peculiar injury to him. But in the complaint he does not set forth any *facts* which show that this right of access has been obstructed by the work already done, or will be obstructed or impaired by the work to be done. It is true that he asserts repeatedly that the construction and operation of the railroad will have such effect, but this is merely an allegation of his conclusions and opinions, and cannot be considered as stating a cause of action. The facts alleged are merely that the defendants are constructing and intend to operate a four-track railroad upon the street in

front of his premises. These facts alone do not make it appear to the court that the plaintiff's right of passage between the street and his premises will be in any degree affected. The operation of a railroad upon a street is not, as to abutting owners, a nuisance *per se*. It may or may not be a nuisance, according to the manner of its construction and operation, and the surrounding circumstances. In the present case the complaint does not allege the width of the street, the location upon the street of the proposed ties or rails, whether or not the ties or rails when completed will project above the surface of the street, how often or in what manner cars or motors will be run upon the rails, or any circumstances showing anything more than that a railroad will be operated upon a street adjoining the plaintiff's premises. It is not even stated whether or not the proposed railroad is a street railroad. The mere fact that railroad cars are to be operated on a street adjoining plaintiff's property does not show any such peculiar injury to him as will justify an injunction restraining the construction and operation of the railroad.

We do not overlook the consideration that, under the constitutional provision that "private property shall not be taken or damaged for public use without just compensation having first been made." (Const. Cal. art. 1, § 14), damages may be recovered by an abutting owner for any public use of a street which damages his adjoining property, or his easement of access to and from the street. *Eachus v. L. A. Ry. Co.*, 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; *Kishlar v. S. P. R. R. Co.*, 134 Cal. 636, 66 Pac. 848; *St. Clair v. S. F., etc., Ry Co.*, 142 Cal. 647, 76 Pac. 485; *Smith v. S. P. R. R. Co.*, 146 Cal. 164, 79 Pac. 868, 106 Am. St. Rep. 17. And, perhaps, a proposed use could be enjoined until the payment of the damage which would follow such use. But the complaint, whether seeking damages after the construction, or an injunction before, must show some actual or threatened injury to a private property right of the plaintiff, and this the present complaint fails to do. The allegation that the proposed work will "greatly lessen and diminish the value" of the property is, like other statements, a mere averment of opinion or conclusion too general and indefinite to afford a basis for relief by injunction.

So far as this is an action to recover damages for past

injury, the allegations of the complaint are open to the same criticism directed against the averments of threatened acts. All that is stated is that the defendants have already commenced digging and excavating the street, and "made a deep and wide trench therein, which greatly obstructs and impedes traffic on said street." There is no allegation that this trench is in the part of the street in front of the plaintiff's premises, nor is it averred, even by way of conclusion, that the trench obstructs the plaintiff's ingress to or egress from his premises. Even if the trench were shown to be immediately opposite plaintiff's property, its character and dimensions are not described. The words "wide and deep" convey no such definite idea as is required in a pleading of this character. Since the only fact alleged as a basis for the recovery of damages is the excavation of this trench, it follows that the complaint fails to show a cause of action for damages, as well as for an injunction.

There is abundant authority in support of the principal proposition discussed in this opinion; i. e., that in an action to enjoin a nuisance there must be an allegation, not merely of the plaintiff's opinion of conclusion as to the effect of the proposed act, but a statement of facts from which the court may draw the conclusion that a nuisance will result. Some of the cases illustrating this rule are *Payne v. McKinley,* 54 Cal. 532; *Dunn v. City of Austin* (Tex. Sup.), 11 S. W. 1125; *Bowen v. Mauzy,* 117 Ind. 258, 19 N. E. 526; *Begein v. Anderson,* 28 Ind. 79; *Kingsbury v. Flowers,* 65 Ala. 479, 39 Am. Rep. 14; *Adams v. Michael,* 38 Md. 123, 17 Am. Rep. 516; *Thebaut v. Canova,* 11 Fla. 167; *Reynolds v. Presidio & Ferries Ry. Co.* (Cal. App.), 81 Pac. 1118. See, also, note to *Ryan v. Copes,* 73 Am. Dec. 106.

The judgment is affirmed.

ANGELLOTTI, J. and SHAW, J., concurred.

SMITH v. SMITH.

Supreme Court of South Carolina. 1897.

50 South Carolina, 54.

Action by Caroline Smith against George W. Smith, on the following complaint:

(1) That on the 27th day of December, A. D. 1885, in the county and state aforesaid, she was duly and legally married to the defendant, George W. Smith. (2) That at the time of such marriage, and at times hereinafter mentioned, both this plaintiff and the defendant were, and are now, domiciled in and actual inhabitants of Chesterfield county, state of South Carolina. (3) That since the said marriage, except at the times hereinafter mentioned, the defendant and this plaintiff lived together as husband and wife, but they have had no children born to them by such marriage. (4) That for some time after the said marriage this plaintiff lived happily and peacefully with the defendant, and he had her confidence and devotion. That subsequently, about two years after said marriage, plaintiff paid a brief visit to her grandchildren, the children of G. C. Cassidy, a son of plaintiff by a former marriage, and when she returned to her home the defendant abused and cursed her, and thereupon the defendant left and deserted her, remaining away for several months; that then, when defendant had expressed sorrow for his conduct, and had promised to conduct himself as a dutiful husband should, and had asked forgiveness for the wrongs which he had done her, plaintiff, acting on these promises, and believing that he was truly sorrowful for his conduct, consented that he should return to her home, where he was always welcome so long as he conducted himself as a dutiful husband should. (5) That after he had returned to her home, and had remained there for some time, he asked plaintiff to make him a deed to the land upon which she lived, and which was then owned by her, but she refused to do so. That thereupon the defendant refused to do any further work on the premises, which were used for agricultural purposes, and threatened to pull down the fences which had been put upon said premises. That defendant then

abused and cursed plaintiff, and left and deserted her, staying away from plaintiff's home several months. That after remaining away for some time the defendant expressed sorrow for his conduct, and asked forgiveness for same, and, after making most solemn promises of amendment and good treatment, she consented for him to return to her home, and he did so return and remain for a while. That at various other times defendant has wantonly outraged plaintiff's feelings as a woman by gross insulting language, which he has used to her and of others in her presence, and has threatened not only to strike plaintiff, but to kill her. That on one occasion since the said marriage the Rev. Mr. Rushton spent the night at plaintiff's home, and the defendant violently abused and cursed plaintiff because she provided breakfast for Mr. Rushton, and cursed and abused him in her presence after he left. That the defendant has repeatedly left and deserted plaintiff since their marriage, and made no provision for her support and sustenance, although he was abundantly able to do so; but each time, except at the time hereinafter mentioned, after making most solemn promises of amendment and good treatment, and expressing his regret for his conduct toward her, she consented that he should return to her home; but the promises, on faith of which she consented for him to return, were each time broken. That finally, some time about the month of March, 1891, after abusing and cursing plaintiff, the defendant left and deserted her, and has done nothing toward her support and sustenance since that time, although he is abundantly able to support himself and plaintiff in comfort, and she has been compelled to work for her own support, except what was given her by G. C. Cassidy, a son of plaintiff by a former marriage, who is a man of very limited means. (6) That plaintiff has always conducted herself as a dutiful wife should, and has always tried to make the defendant's home life happy, so long as he remained with her, and it is through no fault of hers that defendant could not live quietly and happily with her. (7) That plaintiff is now getting quite advanced in years, and she is without property, and almost wholly dependent upon her son, G. C. Cassidy, for a support. (8) That defendant is a man of means, doing a good business, and possessed of ample, sufficient prop-

erty to support himself and plaintiff in the greatest comfort. * * *

Wherefore plaintiff prays judgment: (1) That she be protected in living separate and apart from her husband, the defendant herein, and that he be restrained from in any wise disturbing or interfering with her. (2) That the defendant be required to pay to plaintiff as alimony an adequate and suitable amount of money for her support and maintenance, at such fixed and stated periods, and in such amounts of money, as may by the court be adjudged proper; and also that the defendant be adjudged to pay all the costs, expenses, and charges of the proceedings necessary to obtain the relief herein prayed. (3) For such other and further relief as to the court may seem fit and proper.

* * * * * * * * * *

The defendant moved to strike out many portions of the complaint (which are specifically covered by the exceptions), upon which the following circuit decree was made:

"On hearing the motion of the defendant by his attorneys, W. F. Stevenson and E. J. Kennedy, to strike out certain parts of the complaint herein as redundant, irrelevant, and surplusage, and the further motion to separate and to state separately two alleged causes of action, and elect on which cause of action plaintiff will proceed, after argument for and against the motions, and on consideration of the same, it is ordered, adjudged, and decreed that the said motions be refused and overruled. * * *"

From this order the defendant appeals on the following exceptions:

* * * * * * * * * *

"(6) Because his honor erred in holding that the second paragraph of the complaint was not a statement of irrelevant, surplusage, and redundant matter, and in refusing to grant the defendant's motion to strike it out. (7) Because his honor erred in holding that the third paragraph of the complaint was not a statement of irrelevant, surplusage, and redundant matter, and in refusing to strike the same out on the defendant's motion. (8) Because his honor erred in refusing to strike out the first four lines of the written complaint, which were as follows: 'That

for some time after the said marriage this plaintiff lived happily and peacefully with the defendant, and he had her confidence and devotion;' and he further erred in holding this statement was not irrelevant, redundant, and surplusage matter to any possible issue that could be raised by the pleadings. (9) Because his honor erred in refusing to strike out from the fourth paragraph of the complaint the following words, to wit: 'That subsequently, about two years after the said marriage, plaintiff paid a brief visit to her granchildren, the children of G. C. Cassidy, a son of plaintiff by a former marriage, and when she returned to her home the defendant abused and cursed her, and thereupon left and deserted her, remaining away for several months,'—for the reason that said allegations contain no statement of any facts constituting plaintiff's alleged causes of action, or tending to state the same, but, at the most, is only probative and evidentiary matter, and the same was, therefore, irrelevant, immaterial, and redundant allegations. (10) Because his honor erred in refusing to strike out from the fourth paragraph the following words, to wit: 'That then, when defendant had expressed sorrow for his conduct, and had promised to conduct himself as a dutiful husband should, and had asked forgiveness for the wrongs which he had done her, plaintiff, acting on these promises, and believing that he was truly sorrowful for his conduct, consented that he should return to her home, where he was always welcome so long as he conducted himself as a dutiful husband should,'—for the reason that these allegations do not state any facts constituting plaintiff's alleged causes of action, but are allegations of irrelevant, immaterial, redundant, and evidentiary matters. (11) Because his honor erred in refusing to strike out from paragraph five (5) of the complaint the following words, to wit: 'That after he had returned to her home, and had remained there for some time, he asked her to make him a deed to the land upon which she lived, and which was then owned by her, but she refused to do so. That thereupon the defendant refused to do any further work on the premises, which were used for agricultural purposes, and threatened to pull down the fences which had been put upon the premises,'—for the reason that these allegations do not state any facts constituting plaintiff's alleged causes of action, but are

allegations of irrelevant, immaterial, redundant, and evidentiary matters. (12) Because his honor erred in refusing to strike out from the fifth paragraph of the complaint the following words, to wit: 'That defendant then abused and cursed plaintiff and left and deserted her, staying away from plaintiff's home several months,'—for the reason that said allegations do not state any facts constituting plaintiff's alleged causes of action, but are merely allegations of irrelevant, immaterial, redundant, and evidentiary facts. (13) Because his honor erred in refusing to strike out from paragraph five (5) of the complaint the following words, to wit: 'That after remaining away for some time the defendant expressed sorrow for his conduct, and asked forgiveness for same,'—for the reason that said allegations do not state any facts constituting plaintiff's alleged causes of action, but are mere allegations of irrelevant, immaterial, redundant, and evidentiary matters. (14) Because his honor erred in refusing to strike out from paragraph five of the complaint the following words, to wit: 'That on one occasion since the said marriage the Rev. Mr. Rushton spent the night at plaintiff's home and the defendant violently abused and cursed plaintiff because she provided breakfast for Mr. Rushton,'—for the reason that said allegations do not state any facts constituting plaintiff's alleged causes of action, but state only irrelevant, immaterial, and redundant matter or evidentiary facts. (15) Because his honor erred in refusing to strike out from paragraph five of the complaint the following words, to wit: 'And cursed and abused him [Mr. Rushton] after he left,'—for the reason that said allegations do not state any facts constituting plaintiff's alleged causes of action, but are allegations of irrelevant, immaterial, and redundant facts or evidentiary matters. (16) Because his honor erred in refusing to strike out from paragraph five of the complaint the following words, to wit: 'That the defendant has repeatedly left and deserted plaintiff since their marriage, and made no provision for her support and sustenance, although he was abundantly able to do so, but each time, except at the times hereinafter mentioned, after making most solemn promises of amendment and good treatment, and expressing his regret for his conduct toward her, she consented that he should return to her home,'—for the reason that these alle-

gations do not state any of the facts constituting plaintiff's alleged causes of action, but are allegations only of irrelevant, immaterial, and redundant matter, or statements of evidentiary facts. (17) Because his honor erred in refusing to strike out from paragraph five of the complaint the following words, to wit: 'Except what was given her by G. C. Cassidy, a son of plaintiff by a former marriage, who is a man of very limited means,'—for the reason that these allegations do not state any of the facts constituting plaintiff's alleged causes of action, but are allegations of irrelevant, immaterial, and redundant matters. (18) Because his honor erred in refusing to strike out the sixth paragraph of the complaint, for the reason that the allegations contained in said paragraph were immaterial, irrelevant, and redundant matter. (19) Because his honor erred in refusing to strike out from the seventh paragraph of the complaint the following words, to wit: 'And almost wholly dependent upon her son, G. C. Cassidy, for a support,'—for the reason that these allegations do not state any of the facts constituting plaintiff's alleged causes of action, but the same are allegations of immaterial, irrelevant, and redundant facts. * * * (22) Because his honor erred in refusing to strike out the tenth paragraph of the complaint, for the reason that the allegations therein contained are irrelevant, immaterial, and redundant allegations. (23) Because his honor erred in refusing to compel the plaintiff to make her complaint more definite and certain by so reforming her complaint as to make it clear whether her action was for alimony, both on the ground of desertion and cruelty, or on the ground of desertion only. (24) Because his honor erred in holding that the defendant was not aggrieved by the allegations of the complaint which he had moved to strike out, where said allegations were irrelevant, immaterial, and redundant."

July 13, 1897. The opinion of the court was delivered by Mr. Justice GARY. * * * The exceptions raise practically but three questions, to wit: (1) Was there error on the part of the circuit judge in refusing to strike out various allegations in the complaint because they were irrelevant, redundant, evidentiary, and mere surplusage?

* * * * * * * * * * *

But there is another reason why the exceptions raising this question cannot be sustained. This action is equitable

in its nature. *Prather v. Prather*, 4 Desaus. Eq. 33; *Rhame v. Rhame*, 1 McCord, Eq. 197; 3 Pom. Eq. Jur. § 1120. Pom. Code Rem. § 527, says: "The differences in form between legal causes of action and remedies on the one side and equitable causes of action and reliefs on the other have been described, and need not be repeated. By virtue of these inherent differences, the material facts which must be alleged in an equitable suit are often, in their nature and effects, quite unlike the 'issuable' facts which constitute a legal cause of action. In the legal action the issuable facts are few; in the equitable action the material facts upon which the relief depends, or which influence and modify it, are generally numerous, and often exceedingly so. In the former they are simple, clearly defined, and certain; in the latter they may be, and frequently are, complicated, involved, contingent, and uncertain. * * * The legal cause of action so completely rests for its existence upon the issuable facts that if any one of them, when denied, fails to be established by proof, the plaintiff's entire recovery is defeated thereby,—a result which is recognized by all the judicial decisions as involved in the very definition of a legal issuable fact. An equitable cause of action *may* undoubtedly rest in like manner upon a given number of determinate facts. In general, however, as has already been fully explained, facts may exist material to the recovery in a certain aspect, or in a certain contingency, or to a certain extent, and which, therefore, enter into the cause of action, but are not indispensable to some kind of relief being granted to the plaintiff. These facts, if established, will determine the character, extent, and completeness of the remedy conferred by the court; but, if they are not established, the remedy is not thereby wholly defeated; it is only in some particulars modified, limited, or abridged. Since these classes of facts assist in determining the nature, amount, and details of the relief to be awarded, they, in part at least, 'constitute the cause of action' within the true meaning of the term, and must be alleged. * * * A distinction inheres in the nature of the causes of action, and from this distinction the facts material to the recovery in an equitable suit may be numerous, complicated, affecting the right of recovery partially instead of wholly, modifying rather than defeating, the remedy if not established; but still they are the *material* facts constituting the cause

of action, and not mere details of evidentiary or probative matter." The allegations which the defendant moved to strike out constituted a part of the history of the case, and were important in determining the relief to which the plaintiff was entitled. Upon the trial of the case the plaintiff will be restricted in his testimony to proof of the facts alleged in the complaint; and, instead of the allegations to which the defendant objects aggrieving him, they may work to his advantage, as they inform him beforehand upon what issues the case will be tried. Pom. Code Rem. § 551, says: "An allegation is irrelevant when the issue formed by its denial can have no connection with nor effect upon the cause of action." It cannot be said that the allegations of the complaint which the defendant moved to strike out have no connection with nor effect upon the plaintiff's cause of action, and the exceptions raising this question are overruled.

* * * * * * * * * * *

It is the judgment of this court that the order of the Circuit Court be *affirmed.*

SECTION 3. ALLEGATIONS ON INFORMATION AND BELIEF.

STATE EX REL. v. COOLEY.

Supreme Court of Minnesota, 1894.

58 Minnesota, 514.

BUCK, J.: * * *

1. The respondent contends that denials upon information and belief are not permissible in a return to a writ of mandamus, especially when made by a county officer having no personal interest in the controversy. Several of the allegations in the return which are pleaded as an affirmative defense are stated upon information and belief. If this form of pleading is permitted, it seems to us that a public officer should certainly be allowed to do so. Many facts might exist, and transactions take place, of which he could not have the means of knowing personally or positively, and to which he in no way was a party, and of which it would be difficult for him to obtain a positive knowledge, especially without spending much time for such purpose, and which

might greatly interfere with the faithful discharge of his official duties. He might be informed of such alleged facts or transactions which he believed to be true, and it would seem to be unjust that he should be deprived, through some technicalities or mere matter of form, from alleging their existence upon information and belief. * * * Our statute does not expressly prohibit the pleader from inserting, in his pleadings, allegations upon information and belief. It requires that the complain shall contain a plain and concise statement of facts constituting a cause of action without unnecessary repetition, and that the answer of the defendant shall contain—First, a denial of each allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; second, a statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition. Gen. St. 1878, c. 66, §§ 91, 96.

Now, the matters stated in the answer upon information and belief are intended as a defense to the allegations in the writ. The existence and materiality of the facts so stated are pleaded and brought home to the notice of the relator, even though alleged upon information and belief. * * *

* * * A conscientious and honest man or public officer should not be deprived of his substantial rights because he feels that he can only truthfully allege the existence of certain facts, substantiating those rights upon information and belief. However sincerely he may believe in the existence of such facts, yet, not knowing with absolute certainty of their existence, he should be permitted to allege such facts upon information and belief, and not be driven out of court because he would not utter a falsehood or commit perjury. Under this rule there will be less untruthful verifications, and not so much of a farce, in the verification of pleadings, as complained of by counsel.

With the great amount of litigation that is constantly arising throughout the country, the merits of the case should not be sacrificed to mere forms. If the allegations of a pleading are so indefinite or uncertain that the nature of the charge or defense is not apparent, the court may strike them out on motion, or compel the party to make them more certain by amendment, or, if sham or irrelevant, they may also be stricken out.

The principal question in a pleading is as to whether it is correct in substance, and not merely in form. In the construction of pleadings for the purpose of determining their effect, their allegations are to be liberally construed, with a view to substantial justice between the parties. Gen. St. 1878, c. 66, § 106. The court is required, in every stage of an action, to disregard any error or defect in the pleadings or proceedings which does not effect the substantial rights of the adverse party; and no judgment can be reversed or affected by reason of such error or defect. Id. § 127.

The statute also provides for the verification of pleadings; that is, all pleadings may be verified, and, when any pleading is verified, all subsequent pleadings shall also be verified. The verification shall be to the effect that the same is true to the knowledge of the person making it, except as to those maters stated on information and belief, and, as to those matters, that he believes it to be true. Id. § 104.

This language is not confined merely to the denials in the answer of the controverted allegations in the complaint, but applies to all pleadings, including matters stated in the complaint on information and belief. Why else should the party be required or allowed to verify the matters stated in the complaint upon information and belief, unless he is allowed to insert such matters in that form? Evidently, this section of the statute contemplates that such allegation may be inserted in any of the pleadings; and we believe that such has been the usual practice in this state ever since its admission into the Union, in 1858. It would be a great misfortune for us now to declare that practice invalid, and we refuse so to do. See *Howell v. Fraser*, 1 N. Y. Code Rep. 270, and *Fry v. Bennett*, Id. 238.[1]

* * * * * * * * * * *

[1] The right to make allegations on information and belief should probably be confined to those facts which are not presumptively with the knowledge of, or easily accessible to, the party pleading. Steinberg v. Saltzman (1907,) 130 Wis. 419.

Some courts, with an eye to technical exactness, require the pleader to allege that the fact is true "as he is informed and believes" or other equivalent expression, and hold it insufficient for the pleader to allege that "he is informed and believes that the fact is true," on the ground that the latter is an averment only as to his information and belief and not as to the truth of the fact. Nichols v. Hubert (1899), 150 Mo. 620; Warburton v. Ralph (1894), 9 Wash. 537, 550. But the two forms of expression have also been held substantial equivalents. Robinson v. Ferguson (1903), 119 Iowa 325.

SECTION 4. PLEADING ACCORDING TO LEGAL EFFECT.

HELENA NATIONAL BANK v. ROCKY MOUNTAIN TELEGRAPH COMPANY.

Supreme Court of Montana. 1897.

20 Montana, 379.

Two separate actions by the Helena National Bank against the Rocky Mountain Telegraph Company. * * *

By the complaint in action No. 878, plaintiff sought to recover from defendant the amount of a negotiable promissory note for $200, alleged to have been made by the defendant on October 27, 1892, to the Second National Bank of Helena, and by the payee assigned to the plaintiff, which note contained a promise to pay interest at the rate of 1 per centum per month from its date, and reasonable attorney's fees. The note was subscribed, "Rocky Mountain Telegraph Company, by C. W. Ridgeway, G. M."

The answer denies that the defendant executed the note, and, by a so-called "separate defense," denies that Ridgeway, who, as general manager, subscribed defendant's name to the note, was authorized so to do, and that the money obtained by him was not received by defendant, but was appropriated by him to his own use.

The replication consists of a denial that the money obtained on the note was appropriated by Ridgeway to his own use, and was not paid to or received by the defendant.

At the trial the defendant moved in each case for judgment on the pleadings, which motions were denied. The issues were tried by jury. When plaintiff rested, the defendant moved for nonsuits, upon the ground that the evidence did not tend to prove any authority on the part of Ridgeway to execute the note in the name of the defendant, or to create the overdraft in its behalf. The court overruled each motion. The defendant offered no testimony in either case. The jury returned a verdict for the plaintiff. From the orders denying defendant's motions for new trials, these appeals were taken.

* * * * * * * * * * *

PIGGOTT, J.: 1. Appellant (defendant) contends that its motion for judgment on the pleadings in action No. 878

should have been sustained, upon the ground that the replication did not deny the averments in the answer of want of authority in Ridgway to execute the note in its behalf; the theory being that such averment was new matter, constituting a defense, and therefore admitted for want of denial.

We are satisfied that the averment is not new matter. Ultimate facts only should be pleaded. Plaintiff pleaded the ultimate fact according to its legal effect, by alleging that defendant made the note. This ultimate fact the defendant denied. Corporations necessarily act entirely through agents in all transactions having no relation to the corporation in its corporate capacity, and, under the statement that the corporation executed the note, plaintiff would have been entitled to prove that any authorized agent of the corporation issued the paper in its behalf. The denial in the answer raised the issue whether the note was executed by the corporation through any authorized agency. It was not necessary in law, under the issue raised by the averment and denial of the making, for plaintiff to prove that Ridgway had authority to act; and the so-called "separate defense" was, in legal effect, but a claim that one certain person was without legal authority to perform that which plaintiff charged the corporation with doing; *non constat* that some duly-empowered agent did not deliver the note. As a matter of pleading, as distinguished from evidence, it was unimportant whether or not Ridgway possessed the power to bind the corporation. The manner, as well as the means, of execution, is mere evidence. That portion of the answer setting up so-called "separate defense" consists of evidential matter, the proof of which might or might not become material on the trial. Viewing it in the light most favorable to defendant, the separate defense pleaded was wholly evidence, and therefore redundant. Nor might defendant, by answer, limit the issue to the question of Ridgway's authority.

* * * * * * * * * * *

JOSEPH v. HOLT.

Supreme Court of California. 1869.

37 California, 250.

By the court, SANDERSON, J.: * * *

A contract may be declared on according to its legal effect or in *haec verba*. (*Stoddard v. Treadwell*, 26 Cal. 294.) If either course is to be preferred, we consider it to be the latter, which is also more consistent with the mode of pleading which has been adopted in this state. (Practice Act, Sec. 39.) Where the contract which is declared on is in writing, the insertion of a copy of it in the complaint is the simplest and most satisfactory mode of showing to the court its purport, and legal effect. By such a course *oyer* of the instrument may not be required, and all possibility of variance may be obviated. But to enable the pleader to adopt this latter mode, the instrument which is thus adopted as a part of the complaint must show *upon its face* in direct terms, and not by implication, all the facts which the pleader would have to allege under the former mode of pleading by averment. For example, a note or memorandum in writing of a contract may be sufficient to take it out of the statute of frauds, but prove insufficient as a pleading when put to use for that purpose.

* * * * * * * * * * *

* * * Being a mere note or memorandum, it fails to state the terms of the contract with fullness and precision sufficient to permit its use as a pleading. A complaint should state expressly, that is to say, in direct terms, the facts constituting the cause of action, leaving no essential fact in doubt, or to be inferred or deduced by argument from other facts which are stated. As inference, argument, and hypothesis cannot be tolerated in a pleading (*Green v. Palmer*, 15 Cal. 411), so material facts cannot be left to inference, argument, or hypothesis, but must be expressly and in terms affirmed. Hence the rule which permits the pleader to declare upon a contract in *haec verba*, is and must be limited to cases where the instrument set out contains the formal contract, showing in express terms the promises and undertakings upon both sides. To extend the rule to mere notes or memoranda made, not as consti-

tuting a formal contract, but merely for the purpose of providing written evidence of its terms, sufficient to take it out of the statute of frauds, would be to substitute inference and argument for facts.[1] * * *

[1] A written instrument may be pleaded either way: New York News Pub. Co. v. Steamship Co. (1895), 148 N. Y. 39; Brady v. Peck (1896), 99 Ky. 42; More v. Elmore County Irrigation Co. (1893), 3 Idaho 729; Matthiesen v. Arata (1897), 32 Ore. 342; Blaine v. Knapp (1897), 140 Mo. 241; Nelson v. Great Northern Ry. Co. (1903), 28 Mont. 297.

While this is the general rule, the Supreme Court of Missouri has condemned the pleading of written contracts *in haec verba* on the ground that by so doing the pleader alleges the evidence of the contract rather than the contract itself. Estes v. Desnoyers Shoe Co. (1900), 155 Mo. 577. In this case the court said: "The rules of good pleading require that the instrument relied on should be pleaded by its legal effect, which requirement is not for mere form, but rests on substantial reason. The pleading is addressed to the court and should state the pleader's theory of his case, not leaving it to the court to construct a theory as best it may from the evidence set out, and not leaving his adversary in the dark as to what the theory advanced is, or what construction the pleader puts upon his contract. It is not a contest in which the combatants may catch as they can. If the contract is inartificially drawn so that its meaning or effect is obscure, it is all the more important that the pleader advancing it should take the responsibility of stating its legal effect, leaving the instrument itself to be used as evidence, which is its only office." And in Reilly v. Cullen (1910), 159 Mo. 322, the court held a pleading bad on general demurrer on account of this fault.

On the other hand, the Court of Appeals of New York, in Kidder v. Port Henry Iron Ore Co., given in the text *infra*, seems to disapprove of pleading a written instrument according to its legal effect, and the case suggests the difficulties attendant upon that method of pleading.

KIDDER v. PORT HENRY IRON ORE COMPANY.

Court of Appeals of New York. 1911.

201 New York, 445.

The defendant railroad company owns and operates a railroad from a point in the village of Port Henry, near Lake Champlain, to the mines of the defendant ore company at Mineville, in the town of Moriah. The plaintiff is engaged in the business of dealing in grain at a point along the defendant railroad company's right of way, where he owns a parcel of ground abutting on such right of way, with suitable buildings thereon for the carrying on of such grain business. Between such buildings and the main track the defendant railroad company operates a switch track. The action is brought to compel specific performance of an agreement or covenant by which the ore company, the

predecessor of the defendant railroad company, agreed, in consideration of the grant by the predecessor in title of the plaintiff of a strip of land for the railroad right of way, to carry free of charge one car load of grain per day from the lake to the lands of the plaintiff, and to take back the empty car.

* * * * * * * * * * *

A demurrer to the complaint was interposed by the defendants, upon the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was sustained at the special term and the appellate division; the latter court allowing an appeal to this court, and certifying for determination two separate questions, whether the complaint states facts sufficient to constitute a cause of action against each defendant.

WERNER, J.: It is hornbook learning that a covenant relating to real estate does not run with the land, unless it is of such a nature as to bind, not merely the parties thereto, but their grantees or successors in interest. A covenant is said to run with the land when either the liability to perform it, or the right to enforce it, passes to the assignee of the land. The question before us is not whether the plaintiff is the present owner of lands which are in fact benefited by such a covenant, but whether he has succeeded in framing a complaint which alleges such a covenant. The demurrer interposed by the defendants admits the facts which are set forth in the complaint, but does not admit the conclusions of the pleader.

Tested by these simple elementary rules, the complaint is obviously insufficient. Instead of setting forth the instrument containing the covenant, or pleading the covenant itself *in hæc verba*, the complaint apparently alleges the conclusions of its framer as to the nature and effect of the covenant. The allegation of the complaint is: "The defendant * * * covenanted and agreed, by a covenant under seal, with its * * * grantors, to *allow one car load per day loaded with grain (which car was to be furnished and loaded by the grantors, and to be in charge of a brakeman furnished by the grantors if required) to be attached to any train* going up from said lake upon said railroad, and to draw the same upon and by its trains upon the railroad aforesaid, using the lands so granted as aforesaid to the aforesaid lands of the plaintiff free of charge,

and to draw the empty car back to the lake free of charge; that said covenant was entered into for the benefit of the premises aforesaid, now owned by the plaintiff, and to render them more valuable and useful as a place for conducting the said business of dealing in grain, ground or unground, and the performance thereof is of great value and practically necessary to the said premises and the successful and profitable conduct of the said business upon the same, and the covenant aforesaid is a covenant running with the land as to the plaintiff's premises aforesaid, and was by the parties thereto understood and intended to be a covenant running with the land, when entered into and ever since."

The only covenant alleged by the plaintiff is contained in the foregoing excerpt from the complaint. Where does the covenant begin and end? What portions of this quoted paragraph of the complaint set forth the words of the covenant, and what part the language of the pleader? Suppose that it is possible to segregate from the rest of the paragraph that part which appears to contain the covenant; what is there to indicate that the pleader has not construed the covenant instead of quoting it? The manner in which the alleged covenant is referred to in connection with the context of the second paragraph of the complaint would seem to warrant the conclusion that the pleader has presented his idea of its effect and not a literal transposition of its terms. That this is not a fanciful or technical criticism of the complaint becomes evident when we compare its allegations with those of a former complaint which was held bad on demurrer. In the first complaint the allegation was that the defendant ore company had agreed "to draw upon any train on the railroad aforesaid one car loaded with grain," etc. In the second complaint the allegation is that the ore company agreed "to allow one car per day loaded with grain to be attached to any train," etc. This agreement is alleged to have been made with the grantor. Whether it is a covenant at all, and, if it is, whether it is a covenant which runs with the land, so as to bind the assigns of the grantee for the benefit of the assigns of the grantor, must depend upon the accurate and precise language of the instrument in which the so-called covenant is contained. That instrument is not a part of the complaint. Without it no court should be called upon

to determine the rights of the parties. The courts, no less than the defendants, are entitled to know just what the plaintiff has the right to claim. The complaint in its present form is not sufficient in that regard. In this view of the case it would be an idle ceremony to discuss the authorities which have been cited for our consideration by counsel for the respective parties.

The order of the appellate division should be affirmed, and the demurrer sustained, with costs to the respondents, with the usual leave to the plaintiff to plead over upon payment of costs. Both of the questions certified to us should be answered in the negative.

CULLEN, C. J., and VANN, WILLARD, BARTLETT, HISCOCK, and CHASE, JJ., concur. HAIGHT, J., absent.

Order affirmed, etc.

SECTION 5. LEGAL CONCLUSIONS.

STATE EX REL. v. MALHEUR COUNTY COURT.

Supreme Court of Oregon. 1909.

54 Oregon, 255.

This is a proceeding in mandamus to compel the county court of Malheur county to amend an order of prohibition made by it in June, 1908. The writ sets forth: That the petitioners are residents, taxpayers, and citizens of the city of Vale, in Malheur county, engaged in retail liquor business in that city, * * * that on the 30th day of April, 1908, a petition was filed, calling for a vote on the question of prohibition in the county of Malheur as a whole; that no separate petition for a vote on prohibition was filed for the city of Vale; that an election was held pursuant to such petition, notwithstanding the fact that no notices were ever issued or posted as by law provided; that said election resulted in a majority of 250 votes in favor of prohibition in Malheur county; * * * that by reason of the provisions of its charter, the city of Vale should have been excluded from the operation of the order of prohibition; and that said court was without authority to make any order that might limit the power of the common council regarding the

sale of liquor. Defendants demurred to the writ, and the demurrer was sustained, from which order relators appeal.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

It is claimed by appellants that, irrespective of any view which the court below might have taken of the contention in regard to the plenary power of the city of Vale over the liquor traffic under the conditions of its charter, the allegation in the writ of failure to post notices of the election was sufficient to require the Circuit Court to hear and determine the case on that question. With this contention we are unable to agree. The writ is defective as to the allegation of want of notice. Its language is, "No notice was ever issued or posted as by law provided." In this language it followed the petition. Had the pleader been content with alleging that no notice was ever issued or posted, an issuable fact would have been stated; but the addition of the words, "as by law provided," makes the allegation a mere statement of a conclusion of law. It is equivalent to saying that, in the pleader's judgment, there was something in the manner or time of posting, or in the substance of the notices, that rendered them invalid. There was therefore no question of fact to be tried by the lower court.

* * * * * * * * * * *

VACHON v. NICHOLS-CHISHOLM LUMBER COMPANY.

Supreme Court of Minnesota. 1910.

111 Minnesota, 45.

PER CURIAM: Defendant executed and delivered to John Nay-tah-waush its duebill for $5,490, a balance due upon the price of certain timber purchased by defendant. The amount was, by the instrument, made payable "within 15 days after the patent from the United States government shall have been issued and delivered to the said Nichols-Chisholm Lumber Company, at Frazee, Minn." The payee died. An administrator of his estate was appointed and resigned, and thereafter plaintiff was appointed, and brought this action, as administrator, to recover upon the duebill. A demurrer interposed to the complaint, upon

the ground that it failed to state a cause of action, was overruled.

The complaint does not allege the issuance or delivery of the patent, which was made a condition precedent to the maturing of the debt. It alleges that the duebill "is now due and payable." This is a legal conclusion, and not a sufficient allegation that all conditions precedent have been performed, or, in lieu thereof, a sufficient excuse for their nonperformance. The complaint does not state a cause of action, and the demurrer should have been sustained.

Order reversed.

PEOPLE v. BEACH.

Supreme Court of Colorado. 1911.

49 Colorado, 516.

Mr. Justice CAMPBELL delivered the opinion of the court.

Action upon the official bond of a sheriff, to recover of him and the surety on his official bond damages for alleged nonfeasance of his deputy. The bond was conditioned that the sheriff "shall faithfully perform and execute the duties of the office of sheriff." To the judgment dismissing the action, following a ruling sustaining a demurrer to the complaint, plaintiff has sued out this writ of error. The complaint in substance alleges that Wedow, the deputy sheriff, while acting as such and in the performance of the duties of his office, had under arrest and in custody a certain prisoner whom he was conveying to the county jail for temporary detention or safekeeping, as the law provides. They were riding in a street car from Englewood in Arapahoe county to the city of Denver, and while plaintiff, who was a passenger, was sitting in his seat in the same car near to them and free from fault, the deputy, being then intoxicated, and so acting under color and by virtue of his office, negligently dropped a loaded revolver, which was then on his person, or negligently permitted it to be dropped from his person, to the floor of the car, and the same was exploded and the bullet struck plaintiff in his leg

causing the injuries complained of. The revolver belonged to the prisoner, and was taken from his person by the deputy, acting in his official capacity, sometime prior to the injury, and was being carried by the deputy under color and by virtue of his office, and, to the deputy's knowledge, was loaded; that when the deputy sheriff took possession of the revolver, or soon afterwards, acting in his official capacity, he cocked the same, and negligently and recklessly put it into his pocket in that condition, in which it remained until it fell to the floor of the car and was exploded.

* * * * * * * * * * *

As we understand from the briefs, the theory of the plaintiff is that the deputy sheriff was acting by virtue, and under color, of his office in taking the revolver from the person of the prisoner, and continued so to act while transporting him from the place of arrest to the county jail. In other words, that the failure to act with due care occurred while the deputy was doing an official act, or one which was done by him as an officer under a claim of a right to do so.

It is not every act which a sheriff or his deputy does while, or during the time that, he is engaged in the performance of an official duty for which the sureties on his bond are liable. The true distinction is, we think, that liability does not attach unless the act complained of is an official act, constituting a part, and directly connected with the doing, of an official act. If, for example, the sheriff steps aside from his official duty and negligently does, or omits to do, an act in no wise connected with the discharge of such duty, though done or omitted during the time of its performance, by which another is injured, the sureties certainly could not be held liable in damages therefor. This distinction is well illustrated in the case of *People v. Pacific Surety Company* (Colo.), 109 Pac. 961, and cases therein cited. To bring this case within the rule, upon plaintiff's own theory, he must, *inter alia*, by apt words, allege in his complaint that, in making the arrest of the prisoner it was the duty of the deputy and a part of his official act, and directly connected therewith, as one continuous transaction, to take from him the loaded revolver found upon his person, and safely to keep the weapon until he delivered it and the prisoner to the keeper of the jail; and that while conveying the prisoner from the place of

arrest to the jail, the deputy sheriff, in keeping the loaded revolver on his person, was engaged in the performance of an official act, in negligently dropping the weapon and causing the injury to plaintiff, before the sheriff and his official bondsmen can be held liable. This court has held, in the case of *Newman v People,* 23 Colo. 300, that at the common law, when a sheriff lawfully arrests an offender he may search for and seize and take into custody the subject of the crime, or the thing or instrument by which it was committed, or which might aid the prisoner in escaping, and bring before a magistrate or convey to the jail, the person arrested and the thing or things so seized. See, also, *Closson v. Morrison,* 47 N. H. 482; *Holker v. Hennessey,* 141 Mo. 527. Section 1830, Rev. St. 1908, authorizes such arrest without a warrant in certain cases for carrying concealed weapons. A sheriff, however, has no authority, and it is no part of his official duty, to search and take from a prisoner, whom he has even lawfully arrested, any other property. Neither has he this power of search or seizure unless he has lawfully made an arrest.

There is no allegation in the complaint showing that the deputy ever arrested the prisoner, or one which sets out the charge, if any, on which the prisoner was arrested, or that he had committed any crime with the revolver, or otherwise, or that the weapon was loaded when in his possession, or that it was necessary for the officer to take the same from him as furnishing any evidence of his guilt of an offense, if any, with which he was charged, or that the taking of the weapon was a necessary or reasonable precaution for the officer in the discharge of some supposed official duty. The case is not brought either within the common-law or statutory requirements. It is not enough, in an action of this kind, for the pleader generally to state that the officer is acting "by virtue of, or under color of, his office," or that the acts are of such a character as are authorized by law, or that the same constitute his official duty. These are merely conclusions of the pleader, and not statements of fact at all. *People v. Cobb,* 10 Colo. App. 478. It is not enough merely to allege that the revolver was one which the deputy took from the person of a prisoner, without additional averments of facts showing that the circumstances were such that the taking was justified, in law, as part of the official duty he was then per-

forming; that is, the pleader must, by proper allegations, bring his case within the rule which requires a statement of facts, not a conclusion of the pleader, so that the court may, for itself, determine whether the act for which the officer is said to be liable constitutes an official act, or an act done by virtue of, or under color of, his office. This was expressly held by us in the case of *People v. Pacific Surety Company, supra.* As further showing the insufficiency of the complaint to bring the case within the requirements of these decisions, it may be pointed out that the complaint does not show that the deputy ever made the arrest himself, or that in making it he did so under a valid warrant, or that the arrest was made under circumstances, if such there be, which justify an arrest without warrant. If the arrest of the prisoner was not a lawful one, if made under a void warrant, or without warrant in a case where a warrant is required, or if not made in such circumstances as to justify the arrest without warrant, the officer was not acting in his official capacity, either by virtue of, or under color of, office, and the taking from the prisoner of a revolver, in such circumstances, and carrying it with him or on the car, were acts clearly outside of, and beyond the duties of, his office—merely private or personal acts for which the surety upon the official bond of his principal could not be held liable. These defects in the complaint are not technical; they are substantial. Strictness in a pleading of this sort is necessary in the particulars mentioned. *Allison v. People,* 6 Colo. App. 80.

* * * * * * * * * * *

It is necessary here merely to say that the complaint is not sufficient, in that it signally fails to show by proper averment of facts, although conclusions of law may be pleaded, that the acts charged against the deputy sheriff were done by virtue of or under color of his office.

The judgment of the district court being in accordance with this view, it is affirmed.

Affirmed.

Mr. Justice GABBERT and Mr. Justice HILL concur.

LONG v. DUFUR.

Supreme Court of Oregon. 1911.

58 Oregon, 162.

Mr. Justice BURNETT delivered the opinion of the court.

The crucial question in the case is whether or not Mrs. Mullen was the adopted daughter of Richard Clinton deceased. In support of her case Mrs. Mullen introduced in evidence chapter 7, tit. 15, of the Code of Iowa of 1873, reading as follows:

* * * * * * * * * * *

The reception of this statute in evidence was objected to by the plaintiff on the ground for one thing, that the statute of the sister state of Iowa was not pleaded by the defendant Mullen so as to entitle the same to admission in evidence. The defendant Mullen also introduced in evidence what purported to be copies of two sets of adoption papers relating to her adoption; first, by Cyrus Crooks and Delite Crooks; and, second, by Mary Malinda Clinton and Richard Clinton, which papers, with certificates thereunto annexed, read as follows:

* * * * * * * * * * *

The plaintiff objected to these adoption paper on the ground, among other things, that they do not show a legal adoption under the laws of Iowa or any other state. The allegation of the answer of the defendant Mullen respecting her adoption by Richard Clinton, deceased, reads as follows:

"That at all the times and dates herein alleged, and for more than 20 years last past, Hattie Mullen was, and is now, the duly and legally adopted daughter and heir at law of the said Richard Clinton, deceased."

If it were a matter of pleading a judgment or decree of a court, it would be sufficient to state that the same was duly given or made—this by virtue of the convenient rule of pleading such matters under section 87, L. O. L.—but even then the judgment or decree should be described in such terms as to identify it clearly. On the other hand, where a contract is to be pleaded, it should be set out either according to its legal effect or in its very words, and, if it is made under a particular statute of another state, good

pleading requires that such statute should also be alleged on the principle that in such cases the law of the place where the contract was made is part of the contract. At best the allegation of the answer already quoted is a conclusion of law.

A standard rule of code pleading is to state facts from which the court can draw the legal conclusion desired by the pleader.

Adoption is a proceeding unknown to the common law and depends upon the statutes of the different states.

The courts of this state cannot take judicial notice of the statutes of sister states of the Union.

If a pleader desires to rely upon the legislative enactments of another state, it is his duty to set them out by appropriate pleading, especially where such statutes and the proceedings thereunder are in derogation of the common law. *Cressey v. Tatom,* 9 Or. 541; *Balfour v. Davis,* 14 Or. 47, 12 Pac. 89. Under the rules laid down in these two cases the pleading of the defendant Mullen is clearly insufficient to authorize the introduction in evidence of the statutes of Iowa.

* * * * * * * * * * *

LASSITER v. ROPER.

Supreme Court of North Carolina. 1894.

114 North Carolina, 17.

Civil action tried at January special term, 1894, of Pasquotank Superior Court, before BROWN, J., and a jury.

The action was against the defendant Caleb Roper, administrator of H. E. Lassiter, and the other defendants as his sureties, for a breach of the administration bond.

The defendants in their answer, after denying the allegations of the complaint as to the breach of the bond, alleged as follows:

"That since the final account and settlement of said estate and the institution of this suit the time elapsed is sufficient in law to bar a recovery against those defendants or either of them, and they and each of them pleads the statute of limitations in bar of plaintiff's recovery in this action."

The following issues were submitted to the jury:

"1. Is defendant Roper, as administrator of H. E. Lassiter, indebted to plaintiffs, and if so, in what sum?

"2. Is the cause of action as to said Caleb Roper barred by the statute of limitations?

"3. Is the cause of action as to said defendants, Henry Roper and T. D. Pendleton, sureties on the administration bond, barred by the statute of limitations?"

The plaintiffs objected to issues two and three, relating to the statute of limitations, upon the ground that they were not relevant and proper under the pleadings.

* * * * * * * * * * *

The jury responded to the first issue, "Seventy-nine dollars and sixty cents and interest from February 3, 1884." To the second "No," and to the third "Yes."

The court, before judgment was signed, set aside the verdict as to the issues objected to and withdrew them; to which defendants excepted, and upon judgment being rendered against all the defendants the defendants excepted and appealed.

SHEPHERD, C. J.: In *Bayard v. Malcolm,* a case reported in 1 Johns. 453, Chief Justice KENT remarked: "I entertain a decided opinion that the established principles of pleading, which compose what is called its 'science,' are rational, concise, luminous, and admirably adapted to the investigation of truth, and ought consequently to be very carefully touched by the hand of innovation." It was but in keeping with the spirit of these views that our present system of civil procedure was framed and enacted, and we find this court, very shortly after its adoption, repudiating the idea that loose and uncertain pleading would be tolerated.

In *Crump v. Mims,* 64 N. C. 767, the court said: "We take occasion here to suggest to pleaders that the rules of common law as to the pleading, which are only the rules of logic, have not been abolished by *the code.*" In *Parsley v. Nicholson,* 65 N. C. 210, it was said: "The rules of pleading at common law have not been abrogated. The essential principles still remain, and have only been modified as to technicalities and matters of form." In *Oates v. Gray,* 66 N. C. 442, it was said that the object of *the code* was "to abolish the different forms of action, and the technical and artificial modes of pleading, used at com-

mon law, but not to dispense with the certainty, regularity, and uniformity which are essential in every system adopted for the administration of justice." After other decisions to the same effect, it again became necessary, as it now is, to emphasize these early declarations of the court, and it was therefore remarked in *Vass v. Association,* 91 N. C. 55, that "it was a false notion, entertained by some of the legal profession, that the code of civil procedure is without order or certainty, and that any pleading, however loose and irregular, may be upheld. On the contrary, while it is not perfect, it has both logical order, precision, and certainty when it is properly observed. Bad practice, too often tolerated and encouraged by the courts, brings about confusion and unjust complaints against it." It is hardly necessary to say that it was one of the elementary principles of the common law pleading that "*facts,* only, are to be stated, and not arguments or inferences or matters of law," (1 Chit. Pl. 214;) and that it is still essential to state the facts, which, indeed, is the chief office of pleading, is apparent from the explicit language of the code (sections 233-243), which provides that there must be a "plain and concise statement of the facts constituting a cause of action;" and the same rule, of course, applies to a defense set up in the answer. *Roundtree v. Brinson,* 98 N. C. 107.

In accordance with the foregoing principles, the court held that a complaint "which merely states a conclusion of law,—that is, that the defendant is indebted to the plaintiff and that the debt has not been paid,—is demurrable both at common law and under the code." *Moore v. Hobbs,* 79 N. C. 535. So, in *Roundtree v. Brinson, supra,* in which the defendant pleaded that "the bond was executed by this defendant to the said R. H. Roundtree for an illegal and usurious consideration," it was held that the plea was bad because it did not set forth the facts constituting the defense of usury. In *Pope v. Andrews,* 90 N. C. 401, the plea that "the plaintiff's alleged cause of action is barred by the statute of limitations" was held bad. The court said. "We have before adverted to this insufficient manner of setting up the effect of the lapse of time as an impediment to the suit. This averment that the demand is barred by the statute is but stating a conclusion of law, and not the facts from which it is deduced. This is neither in conformity to the former nor the present mode of pleading the

defense." In *Humble v. Mebane,* 89 N. C. 410, the plea of the statute of limitations was held to be defective, "in that it failed to state when the cause of action accrued, and when the wards arrived at full age." See, also *Love v. Ingram,* 104 N. C. 600. In *Turner v. Shuffler,* 108 N. C. 642, 13 S. E. 243, the language of the answer was that the defendants "plead the statute of limitations of ten, seven, six, and three years, as prescribed in the code, to all said claims, and aver that they are unable to plead the same more definitely to each and all of said claims." This was held defective. The court said: "This is clearly bad and insufficient pleading. The court might, in its discretion, have allowed appropriate amendments; but it was not bound to do so, nor is the exercise of its discretion reversible here." In the case of *Pemberton v. Simmons,* 100 N. C. 316, cited by counsel for defendant, the defense was the presumption of payment under the revised code (chapter 65), and the defective plea seems to have been aided by a reference to "the whole of the pleadings." Whatever may be the true ground of the judgment, it cannot be considered as an authority against the principles laid down in the unbroken line of decisions to which we have referred, and especially in view of the more recent decision of *Turner v. Shuffler, supra.*

It must be manifest that, according to the above authorities, the plea in the present case is fatally defective. The plea is as follows: "That since the final account and settlement of said estate, and the institution of this suit, the time elapsed is sufficient in law to bar a recovery against these defendants, or either of them, and they, and each of them, pleads the statute of limitations in bar of plaintiffs' recovery in this action." This simply amounts to the plea in *Pope v. Andrews, supra,* which was held to be defective. It contains no facts whatever, but is a simple allegation of law, and nothing more. There are no facts in the other parts of the answer which lend any aid to the plea, and from which any legal conclusions can be deduced. Indeed, it is remarkable that there is but one date in the entire pleading, and that is simply as to the death of the intestate. It would introduce inestimable uncertainty and confusion, and bring merited reproach upon our present method of procedure, were we to uphold the plea in this case. It is a very simple requirement of the code, as well as the com-

mon law, that the facts constituting a cause of action or defense shall be plainly set forth. This has not been done by the defendants, and we are therefore of the opinion that the ruling of his honor must be *affirmed.*

SECTION 6. EVIDENCE.

McCAUGHEY v. SCHUETTE.

Supreme Court of California. 1897.

117 California, 223.

SEARLS, C.: This is an action to recover possession from the defendants, who are appellants here, of lots A, B, C, J, K, and L in block 131 of Horton's addition to San Diego, county of Dan Diego, state of California.

Plaintiff had judgment, from which judgment, and from an order denying their motion for a new trial, defendants appeal.

The complaint was demurred to upon the ground, among others, that it does not state facts sufficient to constitute a cause of action. We think the demurrer should have been sustained.

The complaint may be summarized thus: (1) December 22, 1891, defendants made their promissory note to plaintiff for $2,000, and to secure the payment thereof executed a mortgage upon the lots of land sought to be recovered in this action. (2) Afterwards, and on the 22d day of March, 1893, plaintiff and defendants entered into an agreement by the terms of which said defendants agreed to convey to plaintiff, and the latter agreed to take, said real property in full payment of the note, and to release defendants from liability thereon, and deliver the same up to defendants, and to discharge of record the mortgage. (3) That on the 23d day of December, 1893, defendants delivered to plaintiff their grant deed of said premises, and the latter delivered up the note and discharged the mortgage of record. Said deed from defendants to plaintiff and the note and mortgage are made part of the complaint. (4) At the date of the delivery of the deed there was $2,501.28

due on the note, and the deed was made in payment thereof. (5) Defendants are in possession of the premises, and plaintiff has demanded possession thereof, which said defendants refused to deliver up, and exclude plaintiff therefrom against his will and right. Wherefore he demands judgment for the delivery of possession of said premises, etc.

It is a fundamental rule of our code pleading that ultimate, and not probative, facts are to be averred in a pleading. *Miles v. McDermott,* 31 Cal. 271.

In *Thomas v. Desmond,* 63 Cal. 426, it was said, in substance, that, where a complaint merely states the evidence from which ultimate facts are deducible, a demurrer lies.

In *Siter v. Jewett,* 33 Cal. 92, it was held that averments in a complaint of the facts constituting a deraignment of title are but averments of evidence, and are not admitted by a failure to deny them in the answer. *Racouillat v. Rene,* 32 Cal. 450, is to like effect.

In *Gates v. Salmon,* 46 Cal. 361, it was held that an allegation in a complaint that B. executed an instrument in writing, purporting to convey to T. a tract of land, which is recorded (stating where), is a mere allegation of evidence, and may be disregarded as surplusage.

Such evidentiary matters should be stricken out in an action of ejectment. *Wilson v. Cleaveland,* 30 Cal. 192. See, also, *San Joaquin Co. v. Budd,* 96 Cal. 47.

It will be observed that in the complaint in the present case there is no averment of seisin, or ownership, or possession, or right of possession to the demanded premises, but the pleader contents himself with a statement of evidentiary facts which, if proven at the trial, would authorize the court in finding the ultimate fact of ownership and right to possession in the plaintiff.

In *Fredericks v. Tracy,* 98 Cal. 658, it was said of such a pleading that it was insufficient, and that a complaint which stated only facts from which the ultimate fact might be deduced was subject to a demurrer.

In *City of Los Angeles v. Signoret,* 50 Cal. 298, the action was to enforce a lien for the construction of a sewer. The complaint referred to an exhibit, attached to and made a part thereof, for particulars, which exhibit recited the various steps necessary to create the lien, but on demurrer the pleading was held insufficient.

The complaint here is argumentative; that is to say, the

affirmative existence of the ultimate fact is left to inference or argument.

Such pleading was bad at common law, and is none the less so under our code system.

To uphold such a pleading is to encourage proxlixity, and a wide departure from that definiteness, certainty, and perspicuity which it was one of the paramount objects sought to be enforced by the code system of pleading, and that, too, with no resultant effect, except to incumber the record with verbiage, and enhance the cost of litigation.

We recommend that the judgment and order appealed from be reversed, and that the court below be directed to sustain the demurrer to plaintiff's complaint, and that he have leave to amend.

BRITT, C., concurred.

Per Curiam. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the court below directed to sustain the demurrer to plaintiff's complaint, and that he have leave to amend.[1]

HARRISON, J., GAROUTTE, J., VAN FLEET, J.

[1] In Dillahunty v. Railway Co. (1894), 59 Ark. 629, pleading evidence was held to be only a defect of form.

NICHOLS v. NICHOLS.

Supreme Court of Missouri. 1896.

134 Missouri, 187.

MACFARLANE, J. A demurrer to plaintiff's amended petition was sustained, and from the judgment thereon in favor of defendants she appealed. * * *

* * * * * * * * * * *

2. Was the demurrer properly sustained upon the second ground stated? Does the petition state facts sufficient to constitute a cause of action?

The substantial charge in the petition is that defendants wrongfully enticed, influenced, and induced plaintiff's husband to abandon her, and to live separate and apart from her, thereby depriving, and intending to deprive, her of his affection, comfort, society, and support. Defendants

insist that this is but a statement of a conclusion of law; that the acts done and words spoken should have been stated.

The code requires the facts which constitute the cause of action to be stated. A statement of mere legal conclusions is not sufficient, and, on the other hand, a detailed statement of the evidence is not required. Difficulty is sometimes experienced in drawing the line between a statement of fact and a conclusion of law, and between a statement of the ultimate fact and a statement of the evidence by which such fact is to be established.

It may be stated generally that the ultimate constitutive and issuable facts must be stated. Issuable facts are defined to be "those upon which a material issue can be taken." Evidential or probative facts, which should not be stated, are those upon which a material issue cannot be taken, and from which the issuable facts may be inferred. Bliss, Code Pl. § 206.

Pomeroy says: "The material facts which constitute the grounds of relief * * * should be averred as they actually took place, and not the legal effect or aspect of those facts, and not the mere evidence or probative matter by which their existence is established." Pom. Rem. & Rem. Rights, § 517.

Again the same author says: "The allegations must be of those principal, determinate, constitutive facts, upon the existence of which, as stated, the entire cause of action rests, so that, when denied, the issue thus formed with each would involve the whole remedial right." Section 526.

The ultimate fact which is constitutive of the cause of action in this case is that of wrongfully inducing the husband of plaintiff to abandon her. The methods adopted to accomplish that purpose are mere matters of evidence, from which the ultimate fact is proved, or may be inferred. Various methods may have been adopted to accomplish the purpose, and a denial of them, if stated, would not form a single issue involving the whole remedial right. They would be probative, and not constitutive, facts. In the opinion of the jury, an inference that defendants wrongfully induced plaintiff's husband to leave her might not be drawn from one or more acts proved, but might readily be drawn from them all, taken in the aggregate.

No issue could therefore be made upon each act and statement of defendants that would conclude the right of plaintiff to recover.

Wrongfully inducing plaintiff's husband to abandon her is a conclusion of fact, depending upon the proof of acts, declarations, and conduct of defendants. It is not a conclusion of law, but a fact from which a legal conclusion is to be drawn. That legal conclusion was questioned in the first ground of the demurrer. All concur.

Judgment reversed and cause remanded.

SECTION 7. PLEADING BY WAY OF RECITAL, IN THE ALTERNATIVE AND HYPOTHETICALLY.

THOMPSON v. READ.

Supreme Court of New York, Trial Term. 1909.

63 Miscellaneous, 236.

SPENCER, J. The modern practice of granting indulgences to defective pleadings, when raised on the trial or on appeal, may be allowed, as some courts have held pleadings sufficient if they simply foreshadow a cause of action or defense. This seems to be justified by the provisions of section 519 of the Code of Civil Procedure, which require that a pleading must be liberally construed with a view to substantial justice between parties; but, when the question arises on motion or demurrer, a more stringent rule should prevail.

The present action is for slander. Four separate causes of action are set up in the complaint. The demurrer calls in question the third cause of action; the objection made thereto being that the defect in respect to publication renders it ineffectual.

The terms employed by the pleader are as follows: "The foregoing words being spoken in the presence of Fred. E. Parkman, a justice of the peace of the town of Lucerne, N. Y., and a member of the board of health of said town."

The defendant contends that these words do not con-

stitute an allegation of fact. By subdivision 2, § 481, Code Civ. Proc., it is provided that a complaint shall contain a plain and concise statement of the facts. The question therefore arises whether the mode of expression adopted by the plaintiff complies with this requirement. The use of the participle, "being," does not seem to be in conformity with the provision of the code. It does not state in terms that the slanderous words were spoken in the presence of the justice, but assumes that they were so spoken. This distinction is recognized by all grammarians. In the construction of a pleading it may not be ignored. The error may have been an inadvertence on the part of the pleader; but that would not effect the situation in case the pleader should be prosecuted for perjury. In such a case it could not be correctly stated that the pleader had made a statement of fact.

I am therefore of the opinion that the demurrer is well taken, and that the defendant have judgment upon the alleged cause of action, with leave to the plaintiff to plead over, upon the usual terms, with costs.

Demurrer sustained, with leave to defendant to plead over, upon usual terms, with costs.

MALOTT v. SAMPLE.

Supreme Court of Indiana. 1904.

164 Indiana, 645.

GILLETT, J. This was an action by appellee against Volney T. Malott, as receiver of the Terre Haute & Indianapolis Railroad Company, to recover for an injury to appellee's person. A demurrer to the complaint for want of facts was overruled, and the question as to the propriety of this ruling is before us for determination. * * * It appears * * * that appellee was a brakeman in the employ of appellant, and that while in the line of his duty he was injured by a fall from a stirrup upon a freight car, owing to the fact that the stirrup was defective, in that a nut to a bolt that held the stirrup in position had come off, and had not been replaced. * * *

The objections of appellant's counsel to the complaint relate to the element of knowledge upon the part of the master. * * * It is alleged: "That the injuries heretofore set forth, suffered by the plaintiff, were caused by the negligence of the defendant in this, to wit: That the stirrup aforesaid upon which the plaintiff stepped when about to climb said car was allowed to get out of repair by the loss of, and the failure to replace, the nut to the screw that held one end of said stirrup, in place—that is, that end next to the end of the sill of said car; that said stirrup had been out of repair for a sufficient length of time before the happening of the injury to the plaintiff aforesaid for the defendant, by the exercise of reasonable diligence, to have discovered the same, and that, notwithstanding the fact that by the exercise of reasonable diligence the defendant could have discovered the defect in the stirrup aforesaid before the happening of the injury to plaintiff in time to have placed said stirrup in proper repair, said stirrup was not placed in proper repair, but carelessly and negligently allowed to remain in the condition above described."

* * * * * * * * * *

It will be observed in the complaint before us that the first allegation relative to constructive knowledge is that the stirrup had been out of repair for a sufficient length of time for the defendant, by the exercise of reasonable care, to have discovered the same. It is clear that this does not go far enough, for the master cannot be guilty of negligence until a sufficient length of time has elapsed after knowledge, actual or constructive, to afford him an opportunity to repair the defect, or at least to notify the servant of the danger. * * *

The remaining language of the complaint relative to constructive knowledge we again quote, for the sake of having it appear in this immediate connection. It is charged "that notwithstanding the fact that by the exercise of reasonable diligence the defendant could have discovered the defect in the stirrup aforesaid before the happening of the injury to plaintiff in time to have placed said stirrup in proper repair, said stirrup was not placed in proper repair, but carelessly and negligently allowed to remain in the condition above described." It will be observed that all that is alleged by the language just

quoted is that the stirrup was not placed in repair, but was carelessly and negligently allowed to remain in the condition which the pleader had before described. If this were a case where it would be enough merely to charge the master with negligence, the complaint would be sufficient, but here such previous knowledge was indispensable to a right of recovery, and yet we find that there is no direct charge that by the exercise of reasonable diligence the master might have discovered the defect in time to have made the repair. The statement that "notwithstanding the fact" the master might by the exercise of reasonable diligence, have discovered the defect in time to have repaired it before the injury, is not an allegation that the master could have discovered the defect within such time by reasonable diligence, but it is a bald assumption of the existence of a fact which is not averred, which was inserted in the pleading as a mere introduction to the charge of negligence which follows. Bliss, Code Plead. (3d. Ed.), sec. 318, says: "To state or aver that a thing is so or so is very different from speaking of it as being so or so, or whereas it is so or so. A recital is not a statement, but is introductory to a statement; hence, in common-law pleading, where it is allowed as to a class of allegations, it is not traversable. One can not deny what is not asserted; the recital asserts nothing, and, hence, can not be met by a denial."

* * * * * * * * * * *

The nature of the defect in the pleading before us is similar to that in the complaint which was before this court in *McElwaine-Richards Co. v. Wall* (1902), 159 Ind. 557. * * * In passing upon the complaint this court said: "* * * The question with which we have to deal is not one in regard to evidence, but one which relates to pleading. While a court in dealing with evidence may be justified in drawing inferences from certain items of evidence, still it is not warranted in resorting to inferences or deductions where the question involved pertains to the sufficiency of pleading; for the rule recognized at common law and by our code affirms that material facts necessary to constitute a cause of action must be directly averred, and can not be left to depend upon or to be shown by mere recitals or inferences."

The latter part of the observations of this court which

we have just quoted meets the argument of appellee's counsel that the putting of a nut on a bolt is a matter so simple that it would take but a few minutes to do it, and that, therefore, we should hold that the complaint sufficiently discloses knowledge in time to have repaired the defect. As was said in *Louisville, etc., R. Co. v. Corps* (1890), 124 Ind. 427, 8 L. R. A. 636: "We are here dealing with a question of pleading, and not of evidence. There is, as is well known, an essential difference between matters of pleading and matters of evidence; in pleading, facts must be directly and positively averred, while as matter of evidence conclusions may be inferred, without positive statements, from facts and circumstances. In pleading, it is incumbent upon the plaintiff to state all the facts essential to a cause of action, and if any material fact is lacking the complaint will go down before a demurrer." See, also, *Louisville, etc., R. Co. v. Sanford* (1889), 117 Ind. 265; *American Rolling Mill Co. v. Hullinger* (1904), 161 Ind. 673. In this case there is no fact charged from which it can be determined how long the defect had existed, or at what particular time with reference to the accident appellant became infected with constructive knowledge. We cannot supply a material matter of intendment. Upon demurrer we can only assume that a person has not a cause of action so long as he fails to state one on paper.

* * * * * * * * * * *

The judgment of the Superior Court of Marion county is reversed, with a direction to sustain the demurrer to the complaint.[1]

[1] See note on *Recital, infra*, p. 569.

ANDERSON v. MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILWAY COMPANY.

Supreme Court of Minnesota. 1908.

103 Minnesota, 224.

START, C. J.: This is an appeal from an order of the district court of the county of Pope overruling the defendant's demurrer to the complaint in this a personal injury action.

The here material allegations of the complaint, as summarized in the brief of counsel for the plaintiff, are these:

* * *

* * * * * * * * * * *

It is too obvious for argument that these allegations charge the defendant with negligence. It is also clear from the complaint that the plaintiff, at the time he was struck and injured, was standing on the defendant's right of way and so near to the rails that the locomotive in passing struck him. He was then absorbed in watching the operations of a steam shovel, and oblivious and unaware of the approach of the locomotive, although his view to the west, whence the locomotive came, was unobstructed for a mile. He was not an employe of the defendant, nor was he working near the rails for any one, nor was he using the right of way for the purpose of going from the street to the depot, nor was he standing on the right of way at the invitation of the defendant, express or implied. He voluntarily located himself in a place of obvious danger for his own purposes, and while executing them he became oblivious to the approach of the locomotive behind him. Manifestly the complaint shows upon its face that the plaintiff was guilty of contributory negligence as a matter of law.

It follows, then, that the complaint does not state a cause of action, unless the effect of the plaintiff's contributory negligence is obviated by allegations showing that the defendant was guilty of willful or wanton negligence. The pleader in drafting the complaint evidently

appreciated this fact, and attempted to charge the defendant with willful negligence. This presents the pivotal question raised by the demurrer: Does the complaint so charge the defendant. The allegation in this respect is that the servants of the defendant in charge of the locomotive, "although they knew, *or in the exercise of ordinary care on their part could have readily known or ascertained,*" that the plaintiff was in an exposed and dangerous position, nevertheless failed to check the speed of the locomotive, or give any signal or warning of its approach. If the words we have italicized had been omitted from the complaint, it admittedly would have stated a cause of action in favor of the plaintiff, notwithstanding his own contributory negligence, because it would then allege that the defendant was guilty of willful negligence in the premises.

* * * * * * * * * * *

This brings us to the question whether the alternative allegations may be rejected as surplusage. We are of the opinion that they cannot be, for the allegations are to the effect that the defendant either knew, or in the exercise of ordinary care might have known; and, inasmuch as only one of the alternative propositions constitutes willful negligence, it is a clear case of alternative pleading, which is not permissible under any system of practice. Dunnell's Minn. Pleading, § 309; 6 Enc. of Pleading & Practice, 268. Where the only effect of alternative allegations is to render the pleading indefinite or uncertain the remedy is by motion and not by general demurrer. Where, however, as in this case, the complaint alleges in the alternative two statements of fact, one of which would be legally sufficient to constitute a cause of action and the other not, they neutralize each other, and demurrer will lie. See *Guile v. McNanny,* 14 Minn. 520 (Gil. 391) 100 Am. Dec. 244; *Jamison v. King,* 50 Cal. 132, and *Wheeler v. Thayer,* 121 Ind. 64, 22 N. E. 972. If both allegations legally meant the same thing, it would be otherwise. *Clague v. Hodgson,* 16 Minn. 329 (Gil. 291).

It follows that the complaint does not allege facts constituting a cause of action, and that the order appealed from must be reversed, and cause remanded, with leave to

the plaintiff to apply to the district court, if so advised, for permission to amend his complaint.

So ordered.[1]

JAGGARD, J. (dissenting). * * *

[1] See note on *Alternative Pleading, infra*, p. 569.

HASBERG v. MOSES.

Appellate Division of the Supreme Court of New York. 1903.

81 New York Appellate Division, 199.

The complaint avers that the defendant the Mutual Life Insurance Company of New York is a domestic corporation, having an office in the city of New York, and is engaged in the business of life insurance; that the said company issued a policy of insurance upon the life of Emanual Popper for the sum of $3,000; that the said Emanual Popper died intestate, a resident of the city of New York, on the 5th day of May, 1902, and this plaintiff, who is the only heir at law and next of kin of said deceased, was duly appointed administratrix of his estate, and is the only person entitled to such insurance; that due proofs of the death of said intestate were furnished to the defendant company, and said company admits that there is now due upon the said policy of insurance issued upon the life of said intestate $3,969, and the said defendant company notified this plaintiff that said sum was justly due, and that it was ready and willing to pay the same upon receiving a death claim receipt signed by the plaintiff and one Max Moses; that the plaintiff has applied to the said defendant Max Moses to sign such a death claim receipt, as demanded by the defendant insurance company, but that he refuses to sign the same, and has asserted and claimed to plaintiff and to the defendant insurance company that he is entitled to receive the whole of said amount due upon said policy, or some part or portion thereof, by reason of an alleged assignment by said Emanual Popper, deceased, during his lifetime, to the said defendant Max Moses, and

the said defendant Moses has alleged, asserted, and claimed that the said Emanual Popper in his lifetime assigned to him the said policy of insurance.

The plaintiff then avers that she has no knowledge of any such assignment, and alleges that, if ever such an assignment was executed by the said deceased, it was procured to be executed through force and fraud by the said Max Moses, who is an attorney and counselor at law of the state of New York, and was attorney for said deceased during his lifetime; and that, if any such assignment was executed by the said deceased, he never knew its force and effect, and it was merely intended by said deceased to place the said policy of insurance as collateral security for a loan of $700, and upon repayment of the said $700 by the said Emanual Popper, his executors, administrators, or assigns, that the said Max Moses would reassign said policy of insurance to the said Emanual Popper, his heirs, executors, administrators, or assigns; and that the said Emanual Popper fully performed the requirements of said agreement, and repaid to the said Max Moses the said sum of $700, but the said Max Moses failed and refused to perform his part of said agreement, and failed, neglected, and refused to assign said policy back to the said Emanual Popper; and, in any event, the said Max Moses is not entitled to receive from the defendant insurance company the amount due upon said policy of insurance, or any part thereof. Wherefore the plaintiff demands judgment adjudging and decreeing that this plaintiff is entitled to the said sum of $3,969, with any accrued interest thereon, from the said defendant insurance company, and that the said defendant Max Moses has no lien upon the said sum, or upon the said policy of insurance, or any part thereof; and that it be adjudged and decreed that the said Mutual Life Insurance Company of New York pay to this plaintiff the said sum of $3,969, with any accrued interest thereon; and for such other and further relief as to the court may seem just and equitable, together with costs and disbursements against the defendant Max Moses.

The defendant Moses interposed a demurrer to the complaint, which demurrer the court below overruled, permitting the defendant to answer upon the payment of the

costs of the demurrer, and from the judgment entered thereon this appeal is taken.

HATCH, J. * * *

* * * * * * * * * * *

Criticism is further made of the seventh paragraph of the complaint that the averments therein are inconsistent, in that they charge that the assignment held by Moses was wrongfully and unlawfully procured from the insured by force, or without consideration, or without having disclosed its real nature or character, or what the insured was about to execute, or that he received it as collateral security for the payment of a loan, claimed to have been made by the defendant Moses to the insured, and other alternative averments. Because the pleading states facts for relief in an alternative form does not make it bad, if any one of such averments would be sufficient upon which to found the relief asked for in the complaint. *Pittsfield Nat. Bank v. Tailer,* 60 Hun, 130; *Zimmerman v. Kinkle,* 108 N. Y. 282.

Mr. Abbott, in his note to *Munn v. Cook,* 24 Abb. N. C. 314, very clearly states the rule governing such cases: "As before explained, there is a class of cases in which, for no fault of his own, and usually by fault of the defendant, the plaintiff does not know which of two absolutely inconsistent grounds he may succeed in proving, either of which will entitle him to recover; as in the case of fraud or mistake, or a case of suspected agency for an undisclosed principal. If it is important to plaintiff's policy, as it usually is, especially in such classes of cases, to obtain a sworn answer, he must make a sworn complaint; and he cannot, even on information and belief, swear to inconsistent facts. Therefore he cannot state such inconsistent grounds of recovery in separate causes of action, each alleged without qualification. He must state them, if at all, in a single cause of action, and in the alternative. A rule which allows plaintiff to state essential allegations in the alternative is obviously capable of much abuse, because by multiplying alternatives he may leave the defendant quite in the dark as to the facts the latter must be prepared to meet. But within limits which will exclude such abuses, the right of the plaintiff to allege alternative grounds is now recognized by the highest authority, and is not without sanction in the lower courts and courts of

other jurisdictions." Pages 332, 333. Averments in this form are not the subject of demurrer. The remedy, if they are so uncertain as to leave the adverse party in the dark in respect to that with which he is charged, is by motion to make the pleading more definite and certain. *Marie v. Garrison,* 83, N. Y. 14; *Schen v. N. Y. L. & W. R. R. Co.,* 12 N. Y. St. Rep. 99, and cases cited. There is little difficulty in the way of giving force and effect to this rule of pleading, and protecting at the same time the adverse party against any abuse which may arise therefrom.

These views lead to the conclusion that the demurrer to the complaint was properly overruled.

Judgment affirmed, with costs, with leave to the defendant to withdraw demurrer, and answer over within 20 days on payment of costs in this court and in the court below.[1]

[1] *Accord:* Bank of Saluda v. Feaster (1910), 87 S. C. 95; Rasmussen v. McKnight (1883), 3 Utah 315.

Alternative pleading is permitted in a few states by statute. Brown v. Illinois Cent. R. R. Co. (1897), 100 Ky. 525; Otrich v. St. Louis, I. M. & S. Ry. Co. (1911), 154 Mo. App. 420.

EMISON v. OWYHEE DITCH COMPANY.

Supreme Court of Oregon. 1900.

37 Oregon, 577.

This is an action by Mary N. Emison against the Owyhee Ditch Co. to recover damages for the loss of crops alleged to have been caused by the defendant's negligence in permitting water from its ditch to overflow plaintiff's lands. * * *

Mr. Justice MOORE, after stating the facts delivered the opinion of the court:

* * * * * * * * * * *

It is insisted by plaintiff's counsel that the court erred in overruling their motion to strike out the allegation in the answer to the effect that, if any damage was sustained by overflowing said land, it was occasioned by the plaintiff or the companies designated, on the ground that the averment is alternative and hypothetical. The rule is

general that such a form of stating material facts in a pleading is bad. Heard, Steph. Pl. *387. "Such a pleading," says the editor of the Encyclopedia of Pleading and Practice (volume 6, p. 269), "is subject to a motion to make more definite and certain under the Codes." In a note to section 317 in Bliss on Code Pleading (3d Ed.), the author says, "The remedy for hypothetical pleadings is by motion to strike out." [1]

* * * * * * * * * *

[1] Hypothetical pleading is held to be proper in California: Eppinger v. Kendrick (1896), 114 Cal. 620.

SECTION 8. ANTICIPATING DEFENSES.

WESTERN UNION TELEGRAPH COMPANY v. HENLEY.

Supreme Court of Indiana. 1901.

157 Indiana, 90.

Action by Henry Henley and others against the Western Union Telegraph Company for failure to transmit message. From a judgment for plaintiffs, defendant appeals.

Affirmed.

BAKER, J.: * * *

* * * * * * * * * *

The complaint is said to be insufficient because it fails to allege that a revenue stamp was attached to the message and canceled. Section 7 of the revenue law of 1898 makes it the duty of the sender of a telegraphic message to attach and cancel a revenue stamp, under penalty of a fine of not more than $100. Section 18 forbids telegraph companies to send a message to which no stamp is attached, under penalty of a fine of not more than $10. The complaint avers that appellees tendered the message to appellant for transmission, and that appellant accepted the message and undertook to deliver it, and did transmit it to its agent at South Bend, where the default occurred. In an action on a debt, plaintiff need not aver that the

debt was not contracted on Sunday; that it did not arise from gambling, or from the sale of the plaintiff's vote, or the like. Nor should it be necessary for appellees to plead not guilty until they are charged with a violation of the penal laws of the United States. The averment that appellant accepted the message for transmission was a sufficient statement that the message was proper to be accepted. And if appellant had answered that the message, when accepted, was not duly stamped (waiving the sufficiency of such an answer), appellees might have fully replied that appellant agreed, for pay, to attach and cancel the stamp for appellees. It was not incumbent upon appellees to anticipate such a defense. *Smith v. Hunter,* 33 Ind. 106; *Wallace v. Cravens,* 34 Ind. 534; *Prather v. Zulauf,* 38 Ind. 155; *Campbell v. Wilcox,* 10 Wall. 421, 19 L. Ed. 973; *Miller v. Henderson,* 24 Ark. 344; *Hallock v. Jaudin,* 34 Cal. 167; *Grand v. Cox,* 24 La. Ann. 462; *Trull v. Moulton,* 12 Allen, 396; *Cabbot v. Radford,* 17 Minn. 320 (Gil. 296); *Hale v. Wilkinson,* 21 Grat. 75; *Jones v. Davis,* 22 Wis. 421. The holding in *Kirk v. Telegraph Co.* (C. C.) 90 Fed. 809, that the sender of a message must allege in his complaint that he attached and canceled a revenue stamp, does not commend itself to us as a correct rule of pleading.

* * * * * * * * * * *

ROYAL INSURANCE COMPANY v. SCHWING.

Court of Appeals of Kentucky. 1888.

87 Kentucky, 410.

Judge PRYOR delivered the opinion of the court:

This action was instituted by the appellee, Schwing, as surviving partner of the firm of J. Bamforth & Co., against the Royal Insurance Company, to recover on a policy of insurance for the loss of certain produce and goods that were destroyed by fire on the 8th of January, 1886, in a building in the city of Louisville, on Main, between Eighth and Ninth streets, at the time occupied by the firm.

* * * * * * * * * * *

The fourth clause of the policy of insurance provides: "If the building, or any part thereof, falls, except as a result of fire, all insurance under this policy on it or its contents shall immediately cease and determine."

* * * * * * * * * * *

If it was necessary to allege in the petition that the fall of the building was not the cause of the fire, or to aver that the fire caused the fall, then the petition in the case is clearly defective, because there is an absence of any such averment, and, if proper to make such an averment, it was incumbent on the plaintiff to prove, not only that the building and its contents were destroyed by fire, but also to show that the fire caused the fall. * * *

The fourth clause of the policy merely provides a state of case by which the company is exonerated from all liability on a contract executed and conceded to be valid and binding on all the parties; and to compel the plaintiff to plead that no cause for avoiding the contract exists, is requiring it to make an issue that should be tendered by the defense. "What comes by way of proviso," says Lord MANSFIELD, "in a statute, must be insisted on for the purposes of defense; but where exceptions are in the enacting part of the law, the rule is different." "Where a statute provides that no one shall retail spirituous liquors, except for sacramental or other purposes mentioned, it is well settled that the statement of the indictment must negative the fact that the liquor was sold for these purposes." Sedg. St. & Const. Law, 50.

The fourth section provides one of the causes only for which the policy is made to terminate. The life of A. is insured with a separate and distinct clause in the policy that it is to become null and void, or to terminate, in the event he should travel outside of his native state. In such a case it would be unnecessary to aver the non-existence of a fact that, if true, would render the policy void. Such provisions are not conditions precedent, or such exceptions to the enforcement of the contracts as would require the plaintiff to negative their existence. * * *

That which avoids a contract otherwise valid must, as a general rule, be relied on by the defense, and it is not essential to a recovery that the plaintiff must first establish the breach of the covenant, and in addition show that nothing has transpired, since the execution of the contract, that

would excuse the defendant from complying with its stipulations. Such matters come from the defendant, and not from the plaintiff.

* * * * * * * * * * *

A. L. CLARK LUMBER COMPANY v. JOHNS.

Supreme Court of Arkansas. 1911.

98 Arkansas, 211.

McCULLOCH, C. J.: The plaintiff sues to recover damages on account of personal injuries received while working in the service of defendant, and alleges that the injuries were caused by negligence of the defendant in failing to provide a safe place for him to work.

He was employed by defendant to oil the machinery in the sawmill, and in performing his duties it was necessary for him to crawl under the log deck and along the line shaft upon which were placed cogwheels about 2½ feet apart, and these cogwheels were connected with other parts of the machinery which moved the rollers that carried lumber from the saws. All of the cogwheels save one were covered, and the cover of this had been broken off so that the cogs were exposed. While passing under the cogwheel his clothing was caught in the gearing, and was wound up around his shoulders and neck, drawing him into the gearing, so that the cogs ate into his neck and tore out flesh.

He alleged in his complaint that the defendant "had negligently left uncovered one of the cogwheels, and that the coupling which connected the other parts of the machinery with said cogwheels had been loosened to such an extent that it would fly upward; that the plaintiff in performing his duties as oiler had to pass underneath the floor of said sawmill upon a scaffold along the line shaft; and that by reason of the construction of the premises where he was oiling there was not sufficient light for him to see how to perform his duties."

The defendant denied the charge of negligence, and pleaded contributory negligence and assumption of risk.

Plaintiff's testimony tended to sustain all the allegations of the complaint, and was sufficient to warrant a verdict in his favor. He also testified that the day before he was injured he made complaint to the two millwrights, Prewitt and Scott, about the defective condition of the machinery with respect to the broken covering and the exposed condition of the cogwheel, and that they promised to fix it the first time the mill was shut down. There was other testimony to the effect that it was the duty of the millwrights to keep the machinery in repair.

Defendant objected to the testimony as to the complaint to the millwrights and their promise to repair, on the ground that the pleadings contained no allegations of those facts. The court overruled the objection, and defendant asked for a continuance in order to procure the attendance of Prewitt; the other one, Scott, being present. The court denied the request for continuance. It is insisted now that the court erred in these rulings.

Assumption of risk by the plaintiff, being based on an implied contract, was a matter of defense, to be pleaded by the defendant, and the plaintiff was not bound to anticipate in his complaint any defense which could be offered. It was only necessary for him to set forth the charge of negligence on which he relied for a recovery, and, when the defense of assumed risk was brought forward, he had the right to meet it with proof of facts which excluded the implication that he had agreed to assume the risk. "A complaint need not negative matters of defense." *Rozell v. Chicago, M. & L. Co.*, 76 Ark. 525.

It was therefore the duty of the defendant to prepare for the defense which it expected to offer and to anticipate any proof which the plaintiff might make in avoidance of the plea. No reply of the plaintiff was required under the code. Kirby's Dig. § 6108.

* * * * * * * * * * *

SECTION 9. SPECIAL DAMAGES.

FLEDDERMAN v. ST. LOUIS TRANSIT COMPANY.

St. Louis Court of Appeals. 1908.

134 Missouri Appeal, 199.

GOODE, J.: On the morning of October 28, 1904, at about 5 o'clock, plaintiff, while driving a wagon and team in the city of St. Louis, was run into by a trolley car of the defendant and suffered permanent injury—a broken thigh bone. Verdict went for him, and defendant appealed. * * *

* * * * * * * * * * *

3. Plaintiff's injuries were thus alleged: His body was bruised, right arm fractured and right leg broken near the hip. All these injuries were permanent, had caused and would cause him loss of time from his employment, and he had suffered and would suffer great mental and physical pain and expend large sums for physicians and medicines. These statements are challenged as inadequate to let in proof the leg was shortened by the fracture, because such a consequence of the break was not necessary, in the sense of being inevitable, and defendant could not be charged with notice that compensation would be demanded for it unless the petition said so. Whether the shortening of the limb was general or special damage depends, not on whether it was a necessary sequel of the fracture, but on whether it is taken in law to be a necessary consequence of the tortious acts alleged against defendant, for the reason that a like result so usually follows such acts as to raise the legal presumption it followed in a particular case. 2 Sutherland, Damages (3d Ed.) 418 et seq; 3 Sedgwick, Damages (8th Ed.) § 1261; 1 Chitty, Pleadings (16th Am. Ed.) 411; 5 Ency. Pl. & Pr. 717 et seq; *O'Leary v. Rowan*, 31 Mo. 117; *Brown v. Railroad*, 99 Mo. 310; *Nicholson v. Rogers*, 129 Mo. 136. We think the question before us is not, as counsel argue, whether the shortening of the limb constitutes, in legal nomenclature, general or special damages, but whether plaintiff's injuries are stated with enough breadth and de-

tail to admit proof of that injury. We judge, from cases which have been cited, that this question has been confused with the question of whether said injury was the direct and proximate result of the accident, for which plaintiff is entitled to compensation, or a remote result for which he would not be even if specifically stated. 1 Sutherland, Damages, § 55; 8 Am. & Eng. Ency. Law (2d Ed.) 561 et seq.; *Gilliland v. Railroad,* 19 Mo. App. 411; *Bradford v. Railroad,* 64 Mo. App. 475; *Seckinger v. Mfg. Co.,* 129 Mo. 590, 603. What harmful results will be classed, in actions for personal injuries, as general damages and unnecessary to be averred, has been the source of conflicting decisions. In some states medical attention, nursing, loss of earnings, and diminished capacity to attend business are so regarded. 5 Am. Ency. Pl. & Pr. pp. 753, 755. Each of those items is special damage in this state (*Coontz v. Railroad,* 115 Mo. 669; *Smith v. Railroad,* 108 Mo. 243; *Sullivan v. Railroad,* 97 Mo. 113; and, without saying no damage except physical and mental suffering will be presumed from a tortious personal injury, we call to mind no decision by an appellate court of Missouri in which other damage has been treated as general. Those two species of suffering are so commonly incident to such an occurrence that they are accepted as a necessary result, the law presumes they ensued, and a defendant must anticipate a demand for compensation on account of them. *Brown v. Railroad,* 99 Mo. 310, 318.

The shortening of plaintiff's leg is direct, but special, damage, and is not legally implied; but it does not thence follow plaintiff was bound to say, in so many words, his leg was shortened by the accident, in order to obtain compensation for this damage. He averred specifically fracture of his thigh bone, that said injury was permanent, had caused and would cause him loss of time, and that he had suffered and would suffer great mental and physical pain. These statements sufficed to admit proof the limb was shortened without stating it as the particular permanent injury which followed the fracture of the thigh. The permanent result might have been sciatica, withering of the muscles and tissues, or, as actually happened, a diminution of length. The question in hand must be solved on the authority of precedents wherein similar disputed evidence was considered in comparison with the averments

to which its relevancy was asserted, and the courts passed on the point of what averments were definite enough to admit evidence of some particular injury. * * *

In *Montgomery v. Railroad,* 103 Mich. 46, 29 L. R. A. 287, evidence of injury to a lung and consumption following a railroad accident was received on allegations the plaintiff was seriously hurt, wounded, and crippled, his eyes, face, and head bruised, some of his teeth loosened, lips cut, arms and spine bruised and sprained, and that those injuries were permanent, lasting, and incurable. The court said the rule prescribed in *Johnson v. McKee* did not require averment of all the physical injuries sustained by a defendant's wrong, or which might have resulted from or been aggravated by it, even though they did not flow necessarily from it, if they would naturally ensue. This remark is not uniformly sustained as a statement of the rule; for most courts hold, if an injury for which damages are demanded is such an one as follows the alleged tort only naturally and not necessarily (i. e., not meaning inevitably but with a high degree of frequency), it must be alleged specifically.

What particularity of statement will satisfy the requirement of special pleading is the most controverted point. In *Canfield v. City of Jackson,* 112 Mich. 120, it appeared the plaintiff had been hurt by a fall on a defective sidewalk. She proved withering of the flesh about the thigh and hip, induced by partial paralysis, under a declaration alleging her spine was permanently injured, and she was otherwise severely hurt and became sick, lame, and disabled. This evidence was held relevant. In *Beth v. Railroad,* 119 Mich. 512, it was decided a disease of the sciatic nerve might be shown under a declaration of permanent injuries to the hip joint, pelvis, and thigh. In *Fye v. Chapin,* 121 Mich. 675, an action for injuries caused by a dog, the declaration said the plaintiff was injured for life, her nervous system permanently hurt from the shock, that she became and was sick, suffered great bodily and mental anguish, and would continually suffer it, that before she was injured she was a sound and healthy person, but became and was permanently injured, her whole nervous system wrecked, and her blood poisoned and contaminated. These averments were ruled to justify the reception of evidence to prove epilepsy resulted; the ruling being put

on the averment of permanent injuries. In *Ill. Cent. R. R. v. Griffin,* 80 Fed. 278, 25 C. C. A. 413, the declaration alleged nervous prostration and a sensation of numbness and pain in certain parts of the body as results of the accident, and it was held injurious effects to parts of the body not mentioned in the declaration might be shown. The petition, indeed, said the numbness and pain were felt in other parts of the body, as well as in those named; but the court said evidence touching the condition of the nerves of the leg would have been proper without the statement. In *Myers v. Railroad,* 44 App. Div. 11, 60 N. Y. Supp. 422, the plaintiff gave evidence of a permanent disorder of his heart under an allegation that his head, sides, and ribs were permanently injured; and this was held proper. In *Tobin v. Fairport* (Cir. Ct.) 12 N. Y. Supp. 224, on averments that the body and limbs of plaintiff were bruised, that she suffered great bodily injury, and was made sick, sore, and lame, evidence of a subsequent miscarriage was allowed. The court said the allegation that the plaintiff was made sick by the accident was enough to let her prove any sickness which naturally grew out of the injury. * * *

In *Wilbur v. Railroad,* 110 Mo. App. 689, the petition alleged plaintiff "was greatly injured in body and mind and suffered great permanent injury." On this allegation the question arose whether testimony might be given of various internal bodily injuries, suffered in consequence of the plaintiff being thrown from a car against a fence, and thence to the ground, in a collision. That case is like this one; but the statement of injury was less broad and particular. The court said all constitutive facts must be alleged, but this did not require character of the particular wounds and hurts which naturally resulted from the negligent act to be stated; that evidence of particular bodily injuries received in the wreck were admissible under the general averment of injury to the body, especially as defendant had not filed a motion for details of the injury.

Judgment affirmed. All concur.[1]

[1] In a carefully considered opinion by the New York Court of Appeals it was held (three judges dissenting) that where the complaint alleged "that the plaintiff is seriously and permanently injured through his head, skull, eyes and bruises to his right leg and body," damages could not be recovered for deafness caused by the injury to his head. The court said: "In saying that he was seriously and permanently injured through his head, skull, eyes, and

bruises to his right leg and body, he did not include injury to the organs of hearing, but rather confined his specification to general injuries to his head and skull and eyes." Keefe v. Lee (1909), 197 N. Y. 68.

SECTION 10. PRAYER FOR RELIEF.

SMITH v. SMITH.

Supreme Court of Kansas. 1903.

67 Kansas, 841.

PER CURIAM. This was an action by the defendant in error upon a petition setting out facts which would warrant the entering of a decree for a divorce and alimony, or for alimony alone, against the plaintiff in error, then her husband. A decree for both divorce and alimony was entered. The most meritorious question raised upon the petition in error is whether under a petition whose allegations would authorize a divorce, but the prayer of which is only that alimony be allowed, a decree of divorce should be granted. It is well settled in this state that the prayer of the petition forms no part of it, and that relief may be granted in accordance with the facts stated in the petition rather than pursuant to its prayer. *Smith v. Kimball,* 36 Kan. 474, 13 Pac. 801; *Walker v. Fleming,* 37 Kan. 171, 14 Pac. 470. But it is here insisted, where the facts pleaded warrant more than one kind of relief, that plaintiff should have only such relief as he prays for; that otherwise defendant might be misled in the presentation of his evidence, not knowing the ultimate and true purpose of plaintiff in the prosecution of the action. No effort was made by the defendant to require the plaintiff to state how much of relief she was desiring. He knew from the allegations of the petition that she might obtain a divorce. He chose to go into the trial without subsequently requesting a declaration as to the extent of the relief which she desired. Besides this, we think it fairly inferable from the record that the defendant was notified that the action was one by which the plaintiff expected to obtain a di-

vorce, and that defendant conducted his case upon that theory.

* * * * * * * * * * *

The judgment of the lower court will be affirmed.[1]

[1] *Accord:* McGillivray v. McGillivray (1896), 9 S. D. 187; Minneapolis, R. L. & M. Ry. Co. v. Brown (1906), 99 Minn. 384; Bick v. Dixon (1910), 148 Mo. App. 703; Sinder v. Smith (1892), 131 Ind. 147; Randall v. Johnstone (1910), 20 N. D. 493; Donovan v. McDevitt (1907), 36 Mont. 61.

RUSH v. BROWN.

Supreme Court of Missouri. 1890.

101 Missouri, 586.

BARCLAY, J.:

* * * * * * * * * * *

2. The prayer of the petition here is for specific performance and general relief. A general demurrer to the petition having been sustained, and the case brought here in that shape, the question arises, can plaintiff obtain a reversal because the trial court did not enter judgment against one of the defendants (the husband) for the amount of the purchase money paid as alleged? No prayer for such a recovery is contained in the petition. That is evidently framed with a view to such relief as formerly could have been given only by a court of chancery, as distinguished from a court of law.

But it seems to be imagined that any kind of judgment (whether legal or equitable in nature) that any particular facts alleged may warrant should be given, under our Code of Procedure, in such a case, whether asked or not. We do not assent to that view.

One of the purposes of the code is to substitute specific and concise statements of the actual facts of each controversy for the more general declarations of demands formerly in use in courts of law, and the unnecessarily prolix and elaborate pleadings in chancery. The object in view is to have the defendant fully advised in each case of the precise complaint he is called upon to meet.

In harmony with this object, it is provided that the pe-

tition shall contain, among other things, "a demand for the relief to which the plaintiff may suppose himself entitled," and that, "if the recovery of money be demanded, the amount thereof shall be stated, or such facts as will enable the defendant and the court to ascertain the amount *demanded.*" Rev. St. 1889, § 2039.

It is obvious that, upon many states of facts presented to a court for action, divers remedies may be applicable, some strictly legal, others, perhaps, equitable in nature. It would be a departure from the true spirit and meaning of the code to require of plaintiff "a plain and concise statement of the facts constituting his cause of action," without requiring at some stage of the case a plain statement of the judicial action demanded thereon, for the information of the defendant and of the court.

This is especially true where, as in Missouri, by the terms of the constitution, (Const. 1875, art. 2, § 28,) the right of trial by jury is preserved inviolable in ordinary cases, "for the recovery of money only, or of specific real or personal property," (Rev. St. 1889. § 2131,) usually termed "actions at law," whereas suits formerly cognizable in chancery may be properly tried without a jury.

With us it is therefore often of importance to all concerned to know what relief plaintiff demands in order to determine the proper constitutional mode of trial. On this account it is sometimes necessary, in the practical administration of justice, to recur to the inherent distinctions between legal and equitable rights and remedies, and to insist that parties asking aid of the court state the nature of the relief desired, as well as the facts on which they demand it.

It is the duty of all courts to so construe the code as "to secure parties from being misled." Id. § 2117. But it is obvious that parties would often be misled as to the real nature and issues of the case if an ordinary judgment at law might be rendered by the court on a petition praying only equitable relief, without other notice of such legal demand than the supposed case in equity incidentally disclosed.

The code no doubt intended to abolish many distinctions, with respect to form of statement, between actions at law and suits in equity, and to empower the same court, if necessary, in the same proceeding, to adjudicate legal

and equitable rights, and apply thereto legal or equitable remedies; but it does not sanction, and should not be so interpreted as to encourage, such vagueness and uncertainty in the petition as would leave the adverse party and the court in doubt as to the relief demanded, and hence as to the mode of trial, and as to the issues which would be material and decisive in it. *Humphreys v. Milling Co.*, 98 Mo. 542, (1889.)

Moreover, we review in this court only such objections to proceedings as have been expressly decided by the trial court. Rev. St. 1889, § 2302.

Parties who wish to change or enlarge their demand for relief should do so by amendment or otherwise while the cause is before the trial court, at least in those instances where the case goes off upon demurrer, for the general provision permitting the court to grant "any relief consistent with the case made by the plaintiff and embraced within the issues" (Id. § 2216) can have no proper application where final judgment for defendant has been reached on demurrer. In that event, the prayer for general relief, supplemental to one for specific performance, cannot, in view of section 2039, Id., be construed as a prayer for a money judgment.

The judgment of the trial court was correct, and is affirmed, with the concurrence of all the members of the court.[1]

[1] *Purpose of Prayer.* In Cumberland Telephone and Telegraph Co. v. City of Lickman (1908), 129 Ky. 220, the court said: "The prayer for relief serves a twofold purpose: 1. It defines specifically the legal right claimed by the plaintiff, by which the court will be guided in granting or refusing the relief; for while it may not be granted, as not being warranted, supposing the plaintiff has mistaken his right, the court will not voluntarily grant him some other relief which the facts might have entitled him to, but which the plaintiff may not desire, and the court would not in such case be warranted in thrusting it upon him. 2. The other feature of the prayer is to apprise the defendant of what is demanded of him; for the same facts may authorize any of several remedies. If the defendant is informed that only a particular remedy is asked, he may be willing to concede that. Hence he may make no defense. It would be most unjust to allow the plaintiff to subsequently have, or the court to grant, an unclaimed remedy to the defendant's great suprise. But, as more than one remedy may be authorized by the same facts, and as particularly in equity it rests in the sound discretion of the court sometimes as to which of them shall be granted, the plaintiff ought not to be put to the jeopardy of losing his case because he misjudges the temper of the judge. Hence, the code allows, as the common law did, a prayer for alternative relief. Newman's Pl. and Pr., section 356. In such a prayer the court and defendant are advised of the plaintiff's claim of right, and of the specific redress he asks. The defendant is not taken unaware if he confesses

the petition, when the court decides to grant either alternative of the prayer, as he was informed such was specifically demanded."

It is sometimes provided by statute that the relief granted to the plaintiff, if there be no answer, cannot exceed that which is demanded in the complaint, but in other cases the plaintiff may be given any relief to which the facts alleged and proved may entitle him. Perce v. Butte Elec. Ry. Co. (1910), 41 Mont. 304; Johnson v. Polhemus (1893), 99 Cal. 240.

SECTION 11. EXHIBITS.

CAVE v. GILL.

Supreme Court of South Carolina. 1901.

59 South Carolina, 256.

February 15, 1901. The opinion of the court was delivered by

Mr. Justice GARY: The appeal herein is from an order overruling a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The following is a copy of the complaint, to wit:

"The complaint of the above-named complainant respectfully shows that the defendant above named is indebted to the plaintiff, for brick sold and delivered by the plaintiff to the defendant, in the sum of six hundred and five dollars and forty-five cents, as appears by itemized account verified, hereunto annexed as a part of the complaint, and refuses to pay same. Wherefore plaintiff demands judgment against the defendant for six hundred and five dollars and forty-five cents."

The following is the exhibit annexed to the complaint:

* * * * * * * * * *

The appellant assigns error on the part of his honor, the presiding judge, in overruling the demurrer, "for the reason that no contract or agreement is alleged, and no statement of the value of the brick alleged to have been sold is made; that the complaint alleges conclusions of law, and the facts are not stated; that the complaint implies an action on contract, and the annexed exhibit does not supply necessary allegations of facts omitted and not set out in the complaint."

The authorities are not uniform as to whether an instrument of writing annexed to the complaint, and alleged

to be part thereof, can be considered in determining the sufficiency of the allegations of the complaint when a demurrer is interposed. 6 Enc. Pl. & Prac. p. 299, note. In 8 Enc. Pl. & Prac. p. 740, the rule is thus stated: "In the absence of a statute, the annexing and filing of papers as exhibits to a pleading does not make them a part thereof, and they cannot be referred to for the purpose of supplying the omission of a material allegation curing a fatal defect. * * *" In the case of *Burkett v. Griffith* (Cal.) 27 Pac. 527, 13 L. R. A. 707, the court says: "Matters of substance must be alleged in direct terms, and not by way of recital or reference,—much less by exhibits merely attached to the pleading. Whatever is an essential element to a cause of action must be presented by a direct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint," —citing *Mayor, etc., v. Signoret*, 50 Cal. 298. The foregoing is a correct statement, in general terms, of the principle governing such cases. Resort, however, may be had to an exhibit for the purpose of making the allegations of the complaint definite and certain. It may be made "in aid of or in elucidation of the allegations of a pleading, but not to supply entirely the omission of allegations necessary to present a good cause of action." 8 Enc. Pl. & Prac. p. 741, note. The exhibit will not, therefore, be considered in determining whether the allegations of the complaint were sufficient to constitute a cause of action.

The complaint substantially alleges that the plaintiff sold and *delivered* to the defendant a certain quantity of brick, and that the defendant refuses to pay the amount now due.

The prayer of the complaint is for $605.45, the alleged amount of the indebtedness. The alleged sale implies a consideration. *Sires v. Sires*, 43 S. C. 272, 21 S. E. 115. And, if it was not alleged with definiteness and certainty, the proper remedy was by a motion to that effect, but not by demurrer. The same may be said as to the number of brick delivered. The complaint, when considered apart from the exhibit, is indefinite and uncertain; but, as we have said, this does not render it subject to a demurrer. This defect, however, is cured when the complaint is construed in connection with the exhibit. It is

the judgment of this court that the judgment of the circuit court be affirmed.[1]

[1] *Accord*. Realty Revenue Guaranty Co. v. Farm Publishing Co. (1900), 79 Minn. 465; Hickory County v. Fugate (1898), 143 Mo. 71; Estate of Cook (1902), 137 Cal. 184.

In Union Sewer Pipe Co. v. Olson (1901), 82 Minn. 187, it was said that exhibits were not to be taken as substantive allegations of facts "unless the pleading be so framed as to show an intention on the part of the pleader to make them such."

STEPHENS v. AMERICAN FIRE INSURANCE COMPANY.

Supreme Court of Utah. 1896.

14 Utah, 265.

BARTCH, J.: This is a suit on a fire insurance policy to recover for loss occasioned by fire. The defendant interposed a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and judgment entered in favor of the plaintiff for $938 and costs. This appeal was prosecuted from the order overruling the demurrer and from the judgment.

The complaint, after alleging the corporate existence of the defendant, avers that the plaintiff, at the time of its insurance and destruction by fire, was the owner of the property in question; that said property was situated on Washington avenue, in Ogden city, Utah Territory; that on the 30th of November, 1895, in consideration of the payment of a premium of $17.50, the defendant, by its general agent, "made their policy of insurance in writing, which is hereto attached, and made a part of this complaint;" that on December 15, 1895, the insured property was greatly damaged, and in part destroyed, by fire, to the plaintiff's loss thereby in the sum of $1,200; that between the 15th and 25th of December, 1895, the plaintiff furnished proof of the destruction and loss, and otherwise performed all of the conditions of said policy on her part; and that on February 28, 1896, defendant refused to pay

such loss, and denied and disclaimed liability. Counsel for the appellant insist that the complaint, independent of the insurance policy, does not state a cause of action, and that, notwithstanding the express averment to that effect, the policy constitutes no part of the complaint, and cannot be considered in determining its sufficiency. It is not claimed that the policy is not a properly executed and valid instrument, and the objection therefore goes to the practice of pleading by setting forth such an instrument in full. It amounts to this: because, in effect, there can be no difference in setting out an instrument in haec verba and in annexing it, and by proper reference making it a part of the pleading. Possibly, as a matter of arrangement and convenience, the former mode would be preferable, but in either case the instrument becomes a part of the pleading, and if one of these methods is objectionable, equally so is the other. Whether, in a suit upon a contract, the making of the instrument a part of the complaint is the best practice, it is not necessary for us to discuss. Such practice appears to be recognized in this state by statute, as will appear from section 3235, Comp. Laws Utah 1888, which reads as follows: "When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified." This section is identical with section 447 of the California Code of Civil Procedure, and was doubtless borrowed from that state, and the Supreme Court of California has repeatedly recognized the same practice. *Lambert v. Haskell,* 80 Cal. 611; *Ward v. Clay,* 82 Cal. 502; *Whitby v. Rowell,* 82 Cal. 635, 382; *Johnson v. McDuffee,* 83 Cal. 30; *Emeric v. Tams,* 6 Cal. 156; *Hook v. White,* 36 Cal. 299. The same method is also distinctly recognized by Mr. Estee in his work on Pleadings under the Code. 1 Estee, Pl. § 735. See, also *Budd v. Kramer,* 14 Kan. 85; *State v. School Dist.* (Kan.) 8 Pac. 208; *Prindle v. Caruthers,* 15 N. Y. 425; *Elbring v. Mullen* (Idaho) 38 Pac. 404.

Under this practice, however, a party cannot plead matter of mere evidence. Nor will it relieve him from pleading by proper averment matters of substance which are preliminary or collateral to the instrument, and the in-

strument on which the action or defense is based must not be defective or ambiguous, but must clearly, and distinctly present the ultimate facts for which it is incorporated into the pleading, and on which the pleader relies. If it does not so present such facts, or is defective or ambiguous, it is incumbent upon the pleader to place upon it some construction by proper allegation, or else a demurrer will lie.

* * * * * * * * * * *

We are of the opinion the demurrer was properly overruled, and that the record contains no reversible error. The judgment is affirmed.[1]

ZANE, C. J., concurs.

MINER, J.: I cannot concur with my brethren in this case. * * *

[1] *Accord*. Hudson v. Scottish Union & Nat. Ins. Co. (1901), 110 Ky. 722; Am. Freehold Land Mtg. Co. v. McManus (1900), 68 Ark. 263 (in an action in equity).

In *Indiana* an exhibit is deemed part of the pleading when it consists of an instrument upon which the suit in founded Thompson v. Recht (1902), 158 Ind. 302. And in *Nebraska* it is so considered when it consists of an instrument for the unconditional payment of money only: Lincoln Mtg. & Trust Co. v. Hutchins(1898), 55 Neb. 158.

The whole doctrine of exhibits seems to be borrowed from the old equity practice, for no such thing was known at common law.

CHAPTER V.

THE ANSWER.[1]

SECTION 1. GENERAL PRINCIPLES.

STROOK PLUSH COMPANY v. TALCOTT.

Appellate Division of the Supreme Court of New York. 1908.

129 New York Appellate Division, 14.

GAYNOR, J.: The complaint is brief, plain, and clear. It alleges that the plaintiff and the defendant entered into a contract by which the defendant agreed to purchase of

[1] THE CODE PROVISIONS ON THIS SUBJECT IN THE VARIOUS STATES ARE AS FOLLOWS:

Alaska. Carter's Ann. Codes, 1900, Code Civ. Pro.

"§ 63. The answer of the defendant shall contain: 1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. 2. A statement of any new matter constituting a defense or counterclaim in ordinary and concise language without repetition.

"§ 64. The counterclaim mentioned in the last preceding section must be one existing in favor of the defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the following causes of action: 1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim. 2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.

"The defendant may set forth by answer as many defenses and counterclaims as he may have. They shall each be separately stated and refer to the causes of action which they are intended to answer in such manner that they may be intelligibly distinguished."

Arizona. Rev. St., 1901.

"§ 1350. The defendant in his answer may plead as many defenses as he may have; but such pleas must be separately stated in one answer, filed at the same time and in the following order: 1. Denying the jurisdiction of the court. 2. In abatement of the suit. 3. To strike from the complaint irrelevant, redundant or uncertain matter. 4. To make the complaint definite and certain. 5. Demurrer. 6. In bar of the right to sue. 7. Denying the facts constituting the cause of action. 8. Set-off and counter-claim.

"§ 1360. Whenever any suit shall be brought for the recovery of any debt due by judgment, bond, bill or otherwise, the defendant shall be permitted to plead therein any counter-claim which he may have against the plaintiff, subject to such limitation as may be prescribed by law.

"§ 1361. The plea setting up such counter-claim shall state distinctly

the plaintiff at 62½ cents a yard all of the 27-inch embossed plushes which the plaintiff should manufacture from June 15th, the date of the contract, to the following October 1st, in certain specified patterns, the defendant to designate every 15 days the styles to be made for the next two weeks,

the nature and the several items thereof and shall conform to the ordinary rules of pleading.

"§ 1364. If the plaintiff's cause of action be a claim for unliquidated or uncertain damages founded on a tort or breach of covenant, the defendant shall not be permitted to set off any debt due him by the plaintiff; and if the suit be founded on a certain demand, the defendant shall not be permitted to set off unliquidated or uncertain damages founded on a tort or breach of covenant on the part of the plaintiff.

"§ 1365. Nothing in the preceding section shall be so construed as to prohibit the defendant from pleading in set-off any counter-claim founded on a cause of action arising out of, or incident to, or connected with the plaintiff's cause of action."

Arkansas. Kirby's Dig., 1904.

"§ 6098. The answer shall contain: 1. The style of the court and the style of the action, followed by the word 'answer.' But where there are several plaintiffs and defendants, it shall only be necessary to give the one first named of each class, with the words 'and others.' 2. A denial of each allegation of the complaint controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief. 3. A statement of any new matter constituting a defense, counter-claim or set-off, in ordinary and concise language, without repetition. 4. The defendant may set forth in his answer as many grounds of defense, counter-claim and set-off, whether legal or equitable, as he shall have. Each shall be distinctly stated in a separate paragraph, and numbered. The several defenses must refer to the causes of action which they are intended to answer in a manner by which they may be intelligently distinguished.

"§ 6099. The counter-claim mentioned in this chapter must be a cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action."

California. Kerr's Codes, Civ. Pro.

"§ 437. The answer of the defendant shall contain: 1. A general or specific denial of the material allegations of the complaint controverted by the defendant. 2. A statement of any new matter constituting a defense or counter-claim. If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant. If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground. If the complaint be not verified, a general denial is sufficient, but only puts in issue the material allegations of the complaint.

"§ 438. The counter-claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action: 1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. 2. In an action arising upon contract, any other cause of action arising also upon contract and existing at the commencement of the action.

"§ 441. The defendant may set forth by answer as many defenses and counter claims as he may have. They must be separately stated, and the several defenses must refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished. The

deliveries to be made at specified times, and settlements to be made the 10th of each month; that in accordance with the terms thereof the plaintiff manufactured and delivered to the defendant 7,507⅛ yards of the said plushes by July 22d, and that no part of the $4,691.95 therefor

defendant may also answer one or more of the several causes of action stated in the complaint and demur to the residue."

Colorado. Rev. St., 1908, Code Civ. Pro.

"§ 62. The answer of the defendant shall contain: 1. A general or specific denial of each material allegation in the complaint intended to be controverted by the defendant. 2. A statement of any new matter constituting a defense, or counter-claim in ordinary and concise language, without unnecessary repetition. In denying any allegation in the complaint not presumptively within the knowledge of the defendant, it shall be sufficient to put such allegations in issue, for the defendant to state, as to such allegation, that he has not and cannot obtain knowledge or information upon which to base a relief.

"§ 63. The counter-claim mentioned in the last section, shall be one existing in favor of the defendant or plaintiff, and against a plaintiff or defendant, between whom a several judgment might be had in the action, and arising out of one of the following causes of action. 1. A cause of action arising out of the transaction set forth in the complaint or answer, as the foundation of the plaintiff's claim or the defendant's defense, or connected with the subject of the action. 2. In an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action.

"§ 65. The defendant may set forth by answer as many defenses and counter claims as he may have, whether the subject matters of such defenses be such as was heretofore denominated legal or equitable, or both, they shall be separately stated, and the several defenses shall refer to the causes of action which they are intended to answer in a manner by which they may be intelligibly distinguished."

Connecticut. Rev. of 1902, § 609.

"The defendant in his answer shall specifically deny such allegations of the complaint as he intends to controvert, admitting the truth of the other allegations, unless he intends, in good faith, to controvert all the allegations, in which case he may deny them generally, as follows:

"The defendant denies the truth of the matters contained in the plaintiff's complaint.

"He may also, in his answer, state special matters of defense, and shall not give in evidence matter in avoidance, or of defense, consistent with the truth of the material allegations of the complaint, unless in his answer he states such matter specially. Under a general denial the plaintiff shall be bound to prove the material facts alleged in the complaint. If the defendant intends to controvert the right of the plaintiff to sue as executor, or as trustee, or in any other representative capacity, or as a corporation, or to controvert the execution or delivery of any written instrument or recognizance sued upon, he shall deny the same in his answer specifically."

Idaho. Rev. Codes, 1908, §§ 4183, 4184, 4185.

Identical with the California statutes, *supra.*

Indiana. Burn's Ann. St., 1908.

"§ 352. The answer shall contain: 1. A denial of each allegation of the complaint controverted by the defendant. 2. A statement of any new matter constituting a defense, counter claim or set-off, in plain and concise language. 3. The defendant may set forth in his answer as many grounds of defense, counter-claim, and set-off, whether legal or equitable, as he shall

has been paid except the sum of $93.91; that thereafter, and by August 14th the plaintiff manufactured and tendered to the defendant 20,761½ yards thereof, in accordance with the terms of the contract, but the defendant refused to receive the same, and no part of the $12,975.94

have. Each shall be distinctly stated in a separate paragraph, and numbered, and clearly refer to the cause of action intended to be answered.

"§ 353. A set-off shall be allowed only in actions for money demands upon contract, and must consist of matter arising out of debt, duty, or contract, liquidated or not, held by the defendant at the time the suit was commenced, and matured at or before the time it is offered as a set-off.

"§ 355. A counter-claim is any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages."

Iowa. Code, 1897.

"§ 3566. The answer shall contain: 1. The name of the court and county, and of the plaintiffs and defendants, but when there are several plaintiffs and defendants it shall only be necessary to give the first name of each class, with the words 'and others.' 2. A general denial of each allegation of the petition, or of any knowledge or information thereof sufficient to form a belief. 3. A special denial of each allegation of the petition controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief, 4. A statement of any new matter constituting a defense. 5. A statement of any new matter constituting a counter-claim.

"The defendant may set forth in his answer as many causes of defense or counter-claim, whether legal or equitable, as he may have.

"§ 3570. Each counter-claim must be stated in a distinct count or division, and must be: 1. When the action is founded on contract, a cause of action also arising on contract, or ascertained by the decision of a court. 2. A cause of action in favor of the defendants, or some of them, arising out of the contracts or transactions set forth in the petition or connected with the subject of the action. 3. Any new matter constituting a cause of action in favor of the defendant, or all of the defendants if more than one, against the plaintiff, or all of the plaintiffs if more than one, and which the defendant or defendants might have brought when suit was commenced, or which was then held, either matured or not, if matured when so plead."

Kansas. Gen. Stat., 1909.

"§ 5690. The answer shall contain: 1. A general or specific denial of each material allegation of the petition controverted by the defendant. 2. A statement of any new matter constituting a defense, counter-claim or set-off, or a right to relief concerning the subject of the action, in ordinary and concise language, and without repetition. 3. When relief is sought, the nature of the relief to which the defendant supposes himself entitled.

"The defendant may set forth in his answer as many grounds of defense, counter-claim, set-off and for relief as he may have, whether they be such as have been heretofore denominated legal or equitable, or both.

"§ 5691. The counterclaim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action. The right to relief concerning the subject of the action mentioned in the same section must be a right to relief necessarily or properly involved in the action for a complete determination thereof, or settlement of the question involved therein.

"§ 5693. A set-off can only be pleaded in an action in which a recovery of money is sought, and must be a cause of action for the recovery of money."

Kentucky. Carroll's Codes, 1895.

"§ 95. An answer may contain: 1. A traverse. 2. A statement of

therefor has been paid, and that the goods were stored for his account and he was notified thereof; that thereafter the defendant refused and notified the plaintiff that he refused to receive any further deliveries under the said

facts which constitute an estoppel against, or avoidance of, a cause of action stated in the petition. 3. A statement of facts which constitute a set-off or counter-claim. 4. A cross petition.

"§ 96. 1. A counter-claim is a cause of action in favor of a defendant against a plaintiff, or against him and another, which arises out of the contract, or transaction, stated in the petition as the foundation of the plaintiff's claim, or which is connected with the subject of the action. 2. A set-off is a cause of action arising upon a contract, judgment or award in favor of a defendant against a plaintiff, or against him and another, and it can not be pleaded except in an action upon a contract, judgment or award. 3. A cross-petition is the commencement of an action by a defendant against a co-defendant, or a person who is not a party to the action, or against both; or by a plaintiff against a co-plaintiff, or a person who is not a party to the action, or against both; and is not allowed to a defendant, except upon a cause of action which affects, or is affected by, the original cause of action; nor to a plaintiff, except upon a cause of action which affects, or is affected by, a set-off or counter-claim.

"§ 113. . . . 2. A pleading may contain statements of as many causes of action, legal or equitable, and of as many matters of estoppel and of avoidance, legal or equitable, total or partial, and may make as many traverses, and may present as many demurrers, as there may be grounds for in behalf of the pleader. 3. If there be more than one, each must be distinctly stated in a separate numbered paragraph; and either, which is intended to respond to a part only of an adverse pleading, must show to what part it is responsive. . . ."

Minnesota. Rev. Laws, 1905.

"§ 4130. The answer shall contain: 1. A denial of each allegation of the complaint controverted by the defendant, or an averment that he has no knowledge or information thereof sufficient to form a belief. 2. A statement, in ordinary and concise language, of any new matter constituting a counter-claim or defense. 3. All equities in favor of the defendant existing at the time of the commencement of the action, or afterwards and before the service of the answer. If the same be admitted or the issue thereon be determined in favor of the defendant, he shall be entitled to such relief as the nature of the case demands.

"§ 4131. The pleading of a counter-claim shall not be construed as an admission of any cause of action alleged in the complaint. Such counter-claim must be an existing one in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and must be: 1. A cause of action arising out of the contract or transaction pleaded in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action; or, 2. In an action arising on contract, another cause of action arising also on contract, and existing when the action was begun.

"§4132. The defendant may set forth by answer as many defenses and counterclaims as he has. They shall be separately stated, and so framed as to show the cause of action to which each is intended to be opposed. He may also demur to one or more of several causes of action in the complaint and answer to the remainder."

Missouri. Ann. Stat., 1906, §§ 604, 605.

Identical with the Alaska statute, *supra*, with one or two immaterial verbal variations, and adding to the first class of counterclaims the words "or connected with the subject of the action."

Montana. Rev. Codes, 1907.

"§ 6540. The answer of the defendant must contain: 1. A general or specific denial of each material allegation of the complaint controverted by

contract; that the plaintiff performed all of the conditions of the contract to be performed by it, and that its damage by the defendant's breaches is $32,574.01.

The answer is about as unscientific, complex and irksome as could be drawn with that object in view. When

the defendant, or of any knowledge or information thereof sufficient to form a belief, or a specific admission or denial of some of the allegations of the complaint, and also a general denial of all the allegations of the complaint not specifically admitted or denied in the answer. 2. A statement of any new matter constituting a defense or counter-claim.

"§ 6541. The counter-claim specified in the last section must tend, in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action: 1. A cause of action arising out of the contract or transactions, set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action. 2. In an action on contract, any other cause of action on contract, existing at the commencement of the action.

"§ 6549. A defendant may set forth, in his answer, as many defenses or counter-claims, or both, as he has, whether they are such as were formerly denominated legal or equitable. Each defense or counter-claim must be separately stated and numbered. Unless it is interposed as an answer to the entire complaint, it must distinctly refer to the cause of action which it is intended to answer."

Nebraska. Comp. Stat., 1911.

"§ 6673. The answer shall contain: 1. A general or specific denial of each material allegation of the petition controverted by the defendant. 2. A statement of any new matter constituting a defense, counter-claim or set-off, in ordinary and concise language, and without repetition.

"§ 6674. The defendant may set forth in his answer as many grounds of defense, counter-claim and set-off as he may have. Each must be separately stated and numbered and they must refer in an intelligible manner to the cause of action which they are intended to answer.

"§ 6675. The counter-claim mentioned in the last section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action.

"§ 6678. A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract or ascertained by the decision of the court."

Nevada. Comp. Laws, 1900.

"§ 3141. The answer of the defendant shall contain: 1. If the complaint be verified, a special denial of each allegation of the complaint, controverted by the defendant, or a denial thereof according to his information and belief; if the complaint be not verified, then a general denial to each of such allegations; but a general denial shall only put in issue the material and express allegations of the complaint. 2. A statement of any new matter or counterclaim, constituting a defense, in ordinary and concise language.

§§ 3142, 3143. Same as § 64 of the Alaska statute, *supra*, adding to the first class of counter-claims the words "or connected with the subject of the action."

New Mexico. Comp. Laws, 1897. Code Civ. Pro.

§ 40. Same as § 63 of the Alaska statute, *supra*.

§ 41. Same as § 64 of the Alaska statute, *supra*, adding to the first class of counter-claims the words, "or connected with the subject of the action,"

our system of pleading is so plain and easy, if our Code of Civil Procedure be followed, and the object of pleadings is to enable the trial judge to see easily, and at a glance what the issues are, instead of being baffled and per-

and adding to the first sentence in the last paragraph the words, "whether they be such as have been heretofore denominated legal or equitable, or both."

New York. Chase's Code Civ. Pro., 1910.

"§ 500. The answer of the defendant must contain: 1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. 2. A statement of any new matter constituting a defense or counter-claim, in ordinary and concise language without repetition."

§§ 501, 507. Same as §§ 6541 and 6549 of the Montana statute, *supra.*

North Carolina. Revisal of 1905.

§ 479. Same as § 63 of the Alaska statute, *supra.*

§§ 481, 482. Same as § 64 of the Alaska statute, *supra,* adding to the first class of counter-claims the words "or connected with the subject of the action," and adding to the first sentence in the last paragraph the words "whether they be such as have been theretofore denominated legal, equitable, or both."

North Dakota. Rev. Codes, 1905.

§ 6859. Same as § 63 of the Alaska statute, *supra.*

§ 6860. Same as § 64 of the Alaska statute, *supra,* adding to the first class of counter-claims the words "or connected with the subject of the action," and adding to the first sentence in the last paragraph the words "whether they are such as have been heretofore denominated legal, or equitable, or both."

Ohio. Gen. Code, 1910.

"§ 11314. The answer shall contain: 1. A general or specific denial of each material allegation of the petition controverted by the defendant. 2. A statement in ordinary and concise language of new matter constituting a defense, counter-claim or set-off. 3. When the defendant seeks affirmative relief, a demand for such relief.

"§ 11315. The defendant may set forth in his answer as many grounds of defense, counter-claim and set-off as he may have, whether such as heretofore have been denominated legal or equitable, or both. But the several defenses must be consistent with each other, and each must refer in an intelligible manner to the cause of action which it is intended to answer.

"§ 11316. When the answer contains more than one defense, counter-claim or set-off, each must be separately stated and consecutively numbered.

"§ 11317. A counter-claim is a cause of action existing in favor of a defendant against a plaintiff or another defendant, or both, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action.

"§ 11319. A set-off is a cause of action existing in favor of a defendant against a plaintiff between whom a several judgment might be had in the action, and arising on contract or ascertained by the decision of a court. It can be pleaded only in an action founded on contract."

Oklahoma. Comp. Laws, 1909.

§ 5634. Same as § 5690 of the Kansas statute, *supra,* adding the following: "Each must be separately stated and numbered, and they must refer, in an intelligible manner, to the causes of action which they are intended to answer."

§ 5635. Same as § 5691 of the Kansas statute, *supra,* adding the following, "*Provided,* that either party can plead and prove a set-off or counter-claim of the proper nature, in defense of the liability sought to be enforced by the other party, and it shall not be necessary that such set-off shall exist

plexed by them, it is beyond understanding why such an answer as this should be drawn. First in an answer under our system of pleading comes joining of issue on the complaint, i. e., by a general denial or by specific denials,

as between all parties plaintiff and defendant in such suit, but any party may enforce his set-off or counter-claim against the liability sought to be enforced against him. Such set-off or counterclaim shall not be barred by the Statutes of Limitations until the claim of the plaintiff is so barred."

"§ 5639. A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract or ascertained by the decision of a court."

Oregon. Lord's Laws, 1910, Code Civ. Pro.

§ 73. Same as § 63 of the Alaska statute, *supra*, adding to the first subdivision the following, "*provided, however*, that nothing can be proved under a general denial that could not be proved under a specific denial of the same allegation or allegations."

§ 74. Same as § 64 of the Alaska statute, *supra*.

South Carolina. Code of Laws, 1902, Code Civ. Pro.

§ 170. Same as § 63 of the Alaska statute, *supra*.

§ 171. Same as § 64 of the Alaska statute, *supra*, adding to the first class of counter-claims the words, "or connected with the subject of the action," and adding to the first sentence in the last paragraph the words "whether they be such as have been heretofore denominated legal or equitable, or both."

South Dakota. Rev. Codes, 1903, Code Civ. Pro.

§ 126. Same as § 63 of the Alaska statute, *supra*.

§ 127. Same as § 64 of the Alaska statute, *supra*, adding to the first class of counter-claims the words "or connected with the subject of the action," and adding to the first sentence of the last paragraph the words, "whether they be such as have been heretofore denominated legal or equitable, or both."

Utah. Comp. Laws, 1907.

§ 2968. Same as § 6540 of the Montana statute, *supra*.

"§ 2969. The counter-claim mentioned in the next preceding section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action. 1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. 2. In an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action.

"§ 2972. The defendant may set forth by answer as many defenses and counter-claims, legal or equitable, or both, as he may have. They must be separately stated, and the several defenses must refer to the causes of action which they are intended to answer in a manner by which they may be intelligibly distinguished. The defendant may also answer one or more of the several causes of action stated in the complaint and demur to the residue, or may demur and answer at the same time."

Washington. Rem. & Bal. Code, 1910.

§ 264. Same as § 63 of the Alaska statute, *supra*.

§§ 265, 273. Same as § 64 of the Alaska statute, *supra*, adding to the first class of counter-claims the words, "or connected with the subject of the action, and adding to the first sentence in the last paragraph the words, "whether they be such as have heretofore been denominated legal or equitable, or both."

There is also a provision for set-off, § 266.

Wisconsin. Statutes, 1898.

§ 2655. Same as § 63 of the Alaska statute, *supra*.

"§ 2656. The counter-claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff between whom a several

if any material allegation of the complaint can be denied. It is not necessary to formally admit in the answer anything in the complaint; only denials are provided for, and everything not denied stands as admitted. Code Civ. Proc. § 500, subd. 1. Next come defences and counterclaims, viz., "A statement of any new matter constituting a defence or counterclaim." Section 500, subd. 2. And each defence or counterclaim has to be "separately stated and numbered." Id. § 507. A defence, by the said express terms of the code, must be of new matter, i. e., of matter which cannot be proved under a denial, such as payment, accord and satisfaction, general release, fraud or duress in the making of the contract sued upon, the truth of the charge in an action of libel or slander, another action pending, former adjudication, and so on. If the matter can be proved under a denial which is or could be pleaded, it is not new matter, and should not be pleaded as a defence,

judgment might be had in the action, and arising out of one of the following causes of action: 1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. 2. In an action arising on contract, any other cause of action arising also on contract, express or implied, and existing at the commencement of the action. 3. Where the plaintiff is a non-resident of the state any cause of action whatever, arising within the state and existing at the commencement of the action, except that no claim assigned to the defendant shall be pleaded by virtue alone of this subdivision.

"But each counter-claim shall be pleaded as such and be so denominated, and the answer shall contain a demand of the judgment to which the defendant supposes himself to be entitled by reason of the counter-claims therein."

§ 2657. Same as the last paragraph of § 64 of the Alaska statute, *supra*, adding to the first sentence the words, "whether they be such as were formerly denominated legal or equitable, or both."

Wyoming. Comp. Stat., 1910.

"§ 4389. The answer shall contain: 1. A general or specific denial of each material allegation of the petition controverted by the defendant. 2. A statement of any new matter constituting a defense, counter-claim or set-off, in ordinary and concise language.

"§ 4390. The defendant may set forth in his answer as many grounds of defense, counter-claim and set-off as he has, whether they are such as have been heretofore denominated legal or equitable, or both; he may claim therein relief touching the matters in question in the petition against the plaintiff, or against other defendants in the same action; and each must be separately stated and numbered and they must refer in an intelligible manner to the causes of action which they are intended to answer.

"§ The counter-claim mentioned in the last preceding section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action.

"§ 4394. A set-off can only be pleaded in an action founded on a contract, and must be a cause of action arising upon contract, or ascertained by the decision of a court."

and is not a defence, but belongs under a denial, which is negative, and not affirmative, which latter all defences are. If there be no such new matter, the answer should end with a denial or denials. * * *

The first subdivision of this answer is an *allegation* that the defendant has no knowledge or information sufficient to form a belief as to each allegation of the first subdivision of the complaint (which is an allegation that the plaintiff is a corporation and in business), "and therefore denies the same." This is an awkward and unscientific way of availing of the provision of the code permitting a defendant to put his *denial* in the form that he *denies* that he has any knowledge or information sufficient to form a belief of allegations of the complaint, instead of in the form of a positive denial thereof, when he is not able to positively deny them for lack of such knowledge or information. Id. § 500, subd. 1; *Rochkind v. Perlman,* 123 App. Div. 808. And the uselessness and folly of this denial in this answer is manifest in view of the code provision that issue cannot be raised on an allegation in the complaint that the plaintiff is a corporation by denial at all, but only by an affirmative allegation in a verified answer that the plaintiff is not a corporation (Code Civ. Proc. § 1776); so that after the pleader got through with his verbiage subdivision first was still undenied. The next four subdivisions of the answer formally "admit" various things, some of which are not alleged in the complaint at all; and with these admissions are mingled denials in general terms of everything not admitted, so that tiresome scrutiny is required to find out if anything be denied, and, if so, what it is.

Next come four defences, i. e., of new matter (or, as some call them, "affirmative defences," as though there are "negative" defences, and to distinguish them therefrom, whereas the code calls them "denials," not defences, and under no system of pleading were they ever named defences); and with each of the three first of these defences is jumbled and mingled a counterclaim, although the code expressly requires each defence and each counterclaim to be separately stated and numbered. Each is introduced by the following laborious verbiage, varying only from "first" to "second" and so on, viz.: "And for a first, separate and affirmative defense, and by way of counter-

claim, the defendant further alleges." The word "separate" is not only useless but in this case not true, for a defence and counterclaim are mingled in each case in place of being separated. The code requires a defence or a counterclaim to be "separately stated," but not the useless allegation that it is separately stated. The thing is to separate it, not to allege that it is separate. That it is separately stated will appear if it be the fact. In a word, instead of the defences and the counterclaims being separated, and pleaded in the simple, crisp and plain form the code specifies, viz., "For a first defence," "For a second defence," and so on, and "For a first counterclaim," "For a second counterclaim," and so on, all this time-consuming, useless, and not truthful verbiage was resorted to. And before leaving the subject, the phrase, "by way of counterclaim," may as well not go unnoticed. The simple provision of the code is not to plead the new matter "by way of a counterclaim," but actually and directly for a counterclaim.

And each mingled defence and counterclaim begins with these contingent or hypothetical words:

"That if, as alleged in the complaint herein, a contract was entered into between the plaintiff and the defendant on or about the 15th day of June, 1907, for the purchase of the goods referred to in the complaint."

And then follows a statement of facts which, in such case, would be, it is claimed, a defence and also a counterclaim. That is to say, if the contract was made, nay, more, only if it was made on or about June 15th, the facts then alleged would be a defence and a counterclaim. The rule that contingent or hypothetical pleading is not allowed and is not good is too ancient and has been too often reiterated to need discussion. It suffices to refer to the recent text books where the cases are collected and the rule stated—if that be deemed necessary. 6 Encyc. Pl. & Pr. p. 270; Phillips on Code Pl. §§ 240, 357; Maxwell on Code Pleading, p. 395; Bliss on Code Pl. § 340. The few cases which are sometimes cited as contrary to the rule are really not so when you come to analyze them attentively.

There has been some discussion as to what the remedy is for such a pleading, i. e., whether by demurrer or motion to strike the pleading or plea out as irrelevant or redundant. Cases of that class were collected in an opinion in

this court in *Corn v. Levy,* 97 App. Div. 48, but without the question being decided. To continue the citation and discussion of such cases would be unprofitable. It suffices to cite a few of them which decide that demurrer is the proper remedy. *Goodman v. Robb,* 41 Hun, 605; *Fasnacht v. Stehn,* 53 Barb. 650; *Walter v. Fowler,* 85 N. Y. 621; *Cardeza v. Osborn,* 32 Misc. Rep. 46; *Durst v. Brooklyn Heights R. Co.,* 33 Misc. Rep. 124. And it is better yet to read section 545 of the code of civil procedure, the only section of the code under which a motion to strike out could be made, for it will at once be perceived that it was intended to enable irrelevant or redundant matter to be struck out of a pleading or plea, and not to enable the pleading or plea to be struck out in whole. "Irrelevant, redundant, or scandalous matter *contained in a pleading* may be stricken (sic) out upon the motion of the person aggrieved thereby," is the provision; and it is obvious enough that the phrase "in a pleading" embraces a defence and a counterclaim, for they are distinct and independent pleas or pleadings, must be complete in themselves and stand alone and on their own allegations. A defence or demurrer which is not positive, but only contingent or hypothetical, is insufficient in law on its face, and therefore subject to demurrer. Code Civ. Proc. § 494.

Having reached this conclusion it is a subject of relief not to have to go through the copious and stretched out verbiage of the so-called defences and counterclaims, to try to separate them and then see if, in any case, they are sufficient.

The interlocutory judgment should be affirmed in sustaining the demurrer to the counterclaims, and reversed in overruling it to the defences.

WOODWARD, JENKS, HOOKER, JJ., concurred; and RICH, J., concurred in result.

JONES v. CITY OF CALDWELL.

Supreme Court of Idaho. 1911.

20 Idaho, 5.

SULLIVAN, J.: This action was brought to recover damages against the city of Caldwell for an injury alleged to have been sustained by the plaintiff Elizabeth Jones by reason of a defective sidewalk. The accident, it is alleged, occurred on the 27th day of December, 1909.

The answer denies the allegations of the complaint and alleges as a defense that said plaintiff was guilty of contributory negligence.

* * * * * * * * * * *

It is first contended by counsel for the plaintiffs that the court erred in refusing to compel the defendant to elect between the two defenses which it is claimed are set up in one count of the answer. The allegations of the complaint are denied specifically, and as a further defense it is alleged that, if plaintiff sustained any injury whatever from said fall, the same was caused by her own negligence and carelessness. Under the provisions of section 4187, Rev. Codes, the defendant may set up as many defenses or counterclaims as he may have; but such defenses or counterclaims must be separately stated—that is, in separate counts—and good pleading requires separate defenses to be stated in separate counts. This court held, in *Fox v. Rogers*, 6 Idaho, 710, 59 Pac. 538, that the commingling of several causes of action in one count of the complaint is prohibited by the code, but that such commingling was not ground for demurrer; the remedy in such cases being by motion to strike out or compel the pleader to elect. Where a defense consists of specific denials of all the material allegations of the complaint and thereafter sets up some other defense, each of said defenses should be pleaded in separate counts, and the court erred in not requiring the defendant on said motion of the plaintiffs to elect upon which of said causes of defense he would proceed to trial, or to plead each defense in a separate count.

* * * * * * * * * * *

BROWNING, KING AND COMPANY v. TERWILLIGER.

Appellate Division of the Supreme Court of New York. 1911.

144 New York Appellate Division, 516.

DOWLING, J. The complaint herein sets forth two causes of action: (1) For the sum of $4,466.71 due under a written lease of premises 1265-1267-1269 Broadway, borough of Manhattan, city of New York, dated April 3, 1908, and covering the period until May 1, 1924, at the annual rental of $11,000 payable bimonthly, in adition to the sum of $800, annually for Croton water supplied to said premises, payable monthly, of which total the sum of $4,583.34 is for installments of rent due August 1, 1908, December 1, 1908, and February 1, 1910, and credit being given for $850, deposited in court; and the remaining amount, $733.37, being due for Croton water charges for the months of April, 1909, to February, 1910, inclusive. (2) For the sum of $355, due under a written lease of premises 1263 Broadway in the same borough, dated April 3, 1908, and covering the period until April 1, 1914, at the annual rent of $1,000 and $5 in addition for heat to be supplied thereto, payable bimonthly; the installments of rent thereunder for January, March, April, and May, 1910, remaining unpaid. To this complaint defendant interposed an amended answer, which after a denial of the allegations contained in two paragraphs of the complaint, set up certain separate defenses to which plaintiff has demurred.

The separate defense first pleaded, although it is called "a separate or second defense to said action," is obviously intended as an answer to the first cause of action only, for it refers solely to the claim for rent due for August, 1908, December, 1908, and January, 1909, amounting to $2,750, which is at the rate fixed by the lease set forth in the first cause of action.

This separate defense contains no denial of any allegation in the complaint. It is pleaded as a complete defense to the entire action.

It is defective in form, for, if intended as a defense to

the first cause of action, it does not comply with the requirements of the code of civil procedure, as it fails to distinctly refer to the cause of action which it is intended to answer (section 507); and, if intended as a partial defense, it does not so state, nor does it show to what particular cause of action it is deemed to be such (section 508). Not being pleaded as a partial defense, it must be treated as a complete defense to the cause of action. *Mott v. De Nisco,* 106 App. Div. 156. It is not a complete defense to both causes of action because it contains no denials or affirmative allegations appropriate to defeat the second cause of action; nor to the first cause of action, because it contains no denials or affirmative allegations appropriate to defeat the recovery of the amount due for Croton water service or for rent for the month of January, 1910, both of which items are included in that cause of action. Even as a partial defense to the first cause of action, the pleading is insufficient, for it purports to set up a new agreement made on January 15, 1909, for a valuable consideration, by which plaintiff "forgave" the amount of rent then due ($42,750) and agreed to accept rental for the premises described "in said lease" at the rate of $650 per month up to October 1, 1909, and $850 per month thereafter. It is not alleged which premises were covered by the alleged agreement, nor in what lease they were described (there being two leases for separate parcels of property set forth in the complaint), nor what the consideration was which plaintiff received for the new agreement and the relinquishment of its claim for accrued rent. There is no claim that any release was given, nor any statement of what the consideration was which passed from defendant to plaintiff. The allegation that plaintiff made this new agreement abrogating the former written lease and forgave the rent due "for a valuable consideration" is a mere conclusion of law, as is any such allegation when applied to a nonnegotiable instrument, unaccompanied by any statement of the facts showing consideration. *Fulton v. Varney,* 117 App. Div. 575. Nor is there any valid plea of accord and satisfaction, for there is no allegation that the alleged substituted agreement of leasing ever was followed by actual performance thereof. *McCreery v. Day,* 119 N. Y. 1.

* * * * * * * * * * *

The interlocutory judgment appealed from should therefore be modified, with costs to appellant, by providing that the demurrer to the "separate and second defense" * * * be sustained, with leave to defendant to amend his answer as to such defense. * * *

INGRAHAM, P. J., MCLAUGHLIN, SCOTT and MILLER, J. J., concurred.

SECTION 2. DENIALS.

(a) Form.

PETERS v. McPHERSON.

Supreme Court of Washington. 1911.

62 Washington, 496.

PER CURIAM. The respondents, who are attorneys at law, brought his action to recover for professional services. Judgment was awarded them upon the pleadings after answer filed, and the sufficiency of the answer to raise an issue is the question presented on this appeal.

That portion of the pleadings material to be considered are the following. In the complaint it was alleged:

"(2) That on or about the 1st day of August, 1904, defendant employed plaintiffs as his attorneys to defend a certain suit brought against him, entitled *Edward F. Sweeney v. John F. McPherson et al.*, in the superior court of the state of Washington for Kitsap county. That plaintiffs did appear for the defendant and his wife in said suit, and defend the same until its termination and from time to time from the 17th day of August, 1904, until and including the17th day of October, 1907, they expended divers and sundry sums of money to pay the necessary expenses of the defendant in said suit, amounting in all to the sum of eighty-eight and 15/100 dollars ($88.15), which is itemized in schedule 'A' hereunto annexed.

"(3) That the reasonable value of the plaintiff's services to the defendant in said suit was three hundred ($300) dollars.

"And for a second cause of action plaintiffs allege:

"(2) That on or about the 1st day of August, 1907, that the defendant employed the plaintiffs to prosecute for him a suit against the administratrix of the estate of one Brown, deceased, in the Superior Court of the state of Washington in and for King county, which the plaintiffs accordingly did until its termination and in the course thereof expended the sum of four ($4.00) dollars for filing the complaint. That the reasonable value of their services in such suit was fifty ($50.00) dollars."

The answer thereto was as follows:

"(1) Referring to the second paragraph of the first cause of complaint, defendant denies that the plaintiffs expended the sum of $88.15 to pay the necessary or other expenses of defendant in said suit, or in any suit whatsoever, or at all.

"(2) He denies each and every of the allegations contained in paragraph 3 of said first cause of complaint.

"(3) Referring to the second paragraph of the second cause of action in said complaint, defendant denies that the reasonable value of the services of plaintiffs in the suit was $50.

"And for a further and affirmative defense said defendants allege:

"(1) That on or about the 25th day of February, 1909, defendant duly tendered to the plaintiffs the sum of $212.95, in payment for the services of plaintiffs, and the money paid out and expended by them, in the suits, matters, and things set forth in the first and second cause of action in the complaint herein, said tender being made before the commencement of this action, and the amount being the full amount to which plaintiffs are entitled.

"(2) That the defendant has always been and still is, ready and willing to pay the said sum to plaintiffs, and now brings and pays the same into this court for said plaintiffs."

The trial judge held the answer to be a negative pregnant, and hence insufficient to put the plaintiffs upon their proofs. He granted judgment, however, only after he had proffered the defendant leave to amend, and after the defendant had elected to stand on his answer.

The statute (Rem. & Bal. Code, § 264) provides that an answer in order to put in issue the allegations of the com-

plaint must contain a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. It is manifest that this section recognizes two forms of denials, each of which traverses the allegations of the complaint to which it is directed, namely, a general denial, which may be either positive or on information and belief, and a specific denial, which likewise may be either positive or on information and belief. These forms are from their very nature distinct and opposite. The one may be couched in general language and directed against the several paragraphs of the complaint or to the complaint as a whole, while the other must be specific, and controvert each separate allegation of the complaint, those implied from the express allegations as well as the express allegations themselves. And, while no forms for these denials are prescribed by the code, it is the rule, and it is generally so held, that any form of words which clearly and unequivocally traverses the allegations intended to be denied is sufficient for that purpose. But the denials must be clear and unequivocal; hence it is likewise held that literal and conjunctive denials, denials in manner and form, or any form of denial which fails to deny the averment in the complaint intended to be controverted in its substance and intent, is insufficient to raise an issue.

Applying these rules to the case in hand, it is plain that the attempted denial of the second paragraph of the first cause of action and the attempted denial of the second paragraph of the second cause of action are insufficient. They are neither general nor specific denials, but are denials in manner and form, which question the literal truth of the allegations to which they are directed, perhaps, but not their substance nor their effect. But the denial made to the third paragraph of the first cause of action tested by the same principles would seem to be sufficient. It denies each and every allegation contained in the paragraph to which it is directed, and is as definite, it would seem, as a general denial could be made. To have followed this denial, as is sometimes done, and seems to have been thought necessary in this case, with the words, "Deny that the services of plaintiffs were of the value of three hundred dollars, or of any value whatsoever," would not be to deny by a general denial, but by both a general and specific de-

nial—a manner of denial not forbidden by the code, but a manner of denial wholly unnecessary. Moreover, the form here followed by the pleader is as definite as that recognized by this court as proper in *Penter v. Staight,* 1 Wash. 365, 25 Pac. 469, and more definite than the denial held sufficient in *Town of Denver v. Spokane Falls,* 7 Wash. 226, 34 Pac. 926. The denial is also in the form recommended as proper and sufficient by the authorities and works on code pleading generally. Sutherland on Code Pl. & Pr. § 408; also forms No. 102, *et seq.* The argument generally made against this form of denial is that it does not negative the idea that some lesser sum than the precise amount alleged is due the plaintiffs for the services performed, that an allegation to the effect that a certain sum is the reasonable value of stated services implies an allegation that each and every part of the sum alleged is likewise the reasonable value of the services, and hence a general denial must admit the implied allegations, even though it deny those expressly alleged. But clearly this is not sound for many reasons. If it be true that an allegation in a complaint to the effect that a certain sum is the reasonable value of stated services implies an averment that each and every of the parts of such sum are also reasonable, it must be true that a denial which denies each and every allegation in the complaint traverses the implied allegations as well as those that are expressed, for otherwise it is something different from that which it purports to be. It is not a denial of each and every allegation in the complaint, but a denial of a part thereof only. Again, the form of denial is the equivalent of and the substitute for the general issue under the common-law system of pleading. Its use was intended to give the defendant the same right to require the plaintiff to establish by proofs all the material facts necessary to show his right to recover as would be required under the plea of the general issue at the common law. At the common law all of the principal actions in common use could be traversed by pleading the general issue. The form for such plea was, of course, not always the same, for example, in assumpsit, the plea was *non assumpsit,* in debt on simple contract, *nil debet,* in debt on bond or other specialty, *non est factum,* in trespass and in trespass on the case, not guilty, but each plea had the same effect, it traversed each and every allegation

of the complaint to which it was directed. It left nothing to be assumed. It put in issue the expressed as well as the implied allegations of such complaints. Since, therefore, the general denial under the statute is the equivalent of and the substitute for the general issue at common law, by analogy, it ought to have the effect of such a plea, and we think such was the purpose of the code. It seems to us, however, that the strongest argument that can be made in favor of the sufficiency of this form of denial is that it is directly sanctioned by the code. Plainly the code contemplated that every allegation in the complaint, be the same an allegation containing implied averments or otherwise, could be put in issue by a general denial. This being so, the court should recognize that purpose, and give it effect, even though to do so may contravene some previously existing rules of pleading; for power to change the rules of pleading is one of the acknowledged powers of the legislature.

It is said, however, that this court has heretofore laid down a different rule; in fact, both sides find comfort in some of our former decisions, the respondent to sustain the trial court in its entire ruling, and the appellant to support the denials which in this case we hold to be insufficient. It must be confessed that our decisions have not been entirely harmonious on this question. The cases bearing thereon are the following: *Seattle v. Buzby,* 2 Wash. T. 25, 3 Pac. 180; *Gammon v. Dyke,* 2 Wash. T. 266, 5 Pac. 845; *Dillon v. Spokane Co.,* 3 Wash. T. 498, 17 Pac. 889; *Penter v. Staight,* 1 Wash. 365, 25 Pac. 469; *Hansen v. Doherty,* 1 Wash, 461, 25 Pac. 297; *Proulx v. Stetson & Post Mill Co.,* 6 Wash. 478, 33 Pac. 1067; *Denver v. Spokane Falls,* 7 Wash. 226, 34 Pac. 926; *National Bank v. Meerwaldt,* 8 Wash, 630, 36 Pac. 763; *National Bank v. Western Iron & Steel Co.,* 14 Wash. 162, 44 Pac. 145; *Cole v. Noerdlinger,* 22 Wash. 51, 60 Pac. 57; *O'Brien v. Seattle Ice Co.,* 43 Wash. 217, 86 Pac. 399.

We shall not stop to specially review all of these cases. In most of them where the denials have been held not to raise an issue they were plainly denials in manner and form, being neither general nor special. It is worthy of notice, however, that in *Dillon v. Spokane County, supra,* the territorial court made the distinction we have sought to make here. The court, after remarking that certain of

the denials failed to raise an issue because they were denials in manner and form and insufficient, held that the denial to the seventh paragraph of the complaint was sufficient, because, as the court stated, it was "denied by a general denial"; the seventh paragraph being to the effect that the defendant had collected certain sums of money belonging to the county of Spokane for which he had failed to account. The cases that can be said to be contrary to the rule we now announce are *National Bank v. Western Iron & Steel Co.* and *Cole v. Noerdlinger, supra.* The first of these cases was a suit upon a promissory note. The answer admitted the execution of the note, but denied by a general denial an allegation in the complaint to the effect that the same had not been paid and was wholly due. The decision was rested on two grounds: First, that the allegation was immaterial, and hence, need not be proved even if sufficiently denied, on the principle that payment is an affirmative defense which must be pleaded; and, second, that the answer in itself was a negative pregnant. The reason why the court considered the answer a negative pregnant is not stated in the opinion, but it was probably thought that the denial was equivalent only to a denial in manner and form. The case of *Cole v. Noerdlinger* is not quite the same, as the form of the denial is more subject to question, but it seems probable that the court rested its conclusion in that case on the principle that a general denial did not put in issue an allegation of the complaint to the effect that a given sum of money was due and owing from the defendant. These cases we now conclude are not founded on sound principles, and, in so far as they conflict with what is here decided, they will not be followed.

On the other hand, for the purpose of sustaining all of the denials in his answer, the appellant cites and relies upon the case of *O'Brien v. Seattle Ice Co., supra.* In that case we did say that the doctrine of negative pregnant is the doctrine of the common law, and had been abrogated by statute, but it is manifest that there was no intention to negative the rules which require certainty in pleading, or to hold that denials in manner and form were sufficient, as the case was distinguished from the cases so holding which were cited as authority by the other side. We cannot hold, therefore, that this case sustains the sufficiency

of the denials to the second paragraph of the first cause of action or the denials to second paragraph of the second cause of action.

The appellant claims, further, that he is entitled to judgment on his affirmative answer, but plainly the answer is nothing but a plea of tender, which the respondents can admit without waiving their cause of action. For the error, however, in holding the denial to the third paragraph of the first cause of action to be insufficient, the judgment is reversed, and the cause remanded to try the issue made thereby.[1]

[1] Unless a general denial is expressly authorized by the code, no such answer can be employed: Chapman & Dewey Land Co. v. Wilson (1909), 91 Ark. 30.

PRUNTY v. CONSOLIDATED FUEL AND LIGHT COMPANY.

Supreme Court of Kansas. 1910.

82 Kansas, 541.

PER CURIAM. The appellees in each of these cases filed their petition against the appellant for the purpose of cancelling in each case an oil and gas lease. The appellant filed a demurrer in each case, which was by the court overruled. Thereupon the appellant in one case filed an answer in which it "denies each and every allegation in the second amended petition herein that is prejudicial to the rights of the defendant"; and in the other case the appellant filed an answer which "denies each and every allegation in the plaintiffs' petition herein that is adverse to the rights of the defendant." Thereupon the appellant in each case filed a motion for a judgment in its favor on the pleadings, and the appellees in each case filed a motion for judgment on the pleadings in their favor. After argument, the court in each case overruled the motion of the appellant and sustained the motion of the appellees.

* * * * * * * * * * *

As to whether the motion of the appellees for judgment

on the pleadings was correctly decided depends upon whether the answer in each case was sufficient to put the plaintiffs therein upon their proof; whether in fact the answer raised any issue.

The usual form of a general denial to a petition in this state is that defendant denies each and every allegation of fact in the petition contained. In *Munn v. Taulman*, 1 Kan. 254, a denial in this form, "denies each and every allegation in plaintiff's petition alleged against him," while not approved as good form, was held sufficient to apprise the plaintiff what defense was intended to be set up in bar of his claim. In Webster's Universal Dictionary, in the definition of "adverse," among the synonyms given are "opposite," "hurtful," "unfavorable"; and as synonyms of "prejudicial" are given "hurtful," "injurious," "disadvantageous."

In so simple a matter as a general denial there is no occasion to depart from the well-recognized form, and probably the court could without prejudice have sustained a motion to make these answers more definite and certain; but we do not think the answers were nullities and so defective as to raise no issue, but were sufficient to apprise the appellees what defense was intended to be maintained in bar of their claims.

The judgment, therefore, in each case is reversed, and each case remanded for further proceedings in accordance with these views.

BURCH, J., dissenting.

COOPER v. AMERICAN CENTRAL INSURANCE COMPANY.

Kansas City Court of Appeals. 1909.

139 Missouri Appeal, 570.

JOHNSON, J. This is a suit on a policy of fire insurance. Defendant answered, but on motion of plaintiff the court struck out the answer. Defendant refused to plead further, and stood on its answer. The court heard the evidence introduced by plaintiff, and rendered judgment for

him in accordance with the prayer of the petition. Defendant appealed to the Supreme Court but that tribunal on motion transferred the cause here.

* * * * * * * * * * *

Defendant filed the following answer and "cross-bill in equity":

"(5) Defendant further denies generally any knowledge or information sufficient to form a belief of the other allegations of the petition not hereinbefore admitted, and not herein specifically denied."

* * * * * * * * * * *

Is the pleading good as a general traverse? The answer to this question depends on the construction that should be given the fourth and fifth paragraphs. The latter paragraph means nothing and is too evasive to raise an issue. Its denial of knowledge, information, etc., is restricted to allegations of the petition "not hereinbefore admitted, and not herein specifically denied." An answer to be good as a traverse must clearly and unequivocally deny the existence of one or more of the facts elemental to the cause of action. It must not leave the denial dependent on inference or conclusion either of law or fact and must not require the plaintiff and the court to resort to an analysis of the pleading to ascertain what is denied and what is admitted. *Dezell v. Fidelity & Casualty Co.*, 176 Mo., loc. cit. 278; *Young v. Schofield*, 132 Mo. 650; *Ritchey v. Insurance Co.*, 98 Mo. App. 115; *Snyder v. Free*, 114 Mo. 360; *Long v. Long*, 79 Mo. 644.

In *Snyder v. Free, supra,* the Supreme Court say: "The central idea of code pleading is that an answer should not be evasive, but should meet the allegations of the petition fairly and squarely, thus presenting sharply defined issues for the triers of the facts to pass upon. Rev. St. 1889, § 2049. On a former occasion this court denounced the method here employed as a 'vicious method of pleading,' and this was an apt characterization of such a faulty way of pleading. It was never the design of the code that a party plaintiff should have to carefuly sift each denial of the answer, and to carefully compare it with each paragraph of the petition, in order to see what is admitted and what is denied. Such denials may be general or they may

be special, but in either event the issue must be sharply defined, and not left to surmise or conjecture."[1]

* * * * * * * * * * *

[1] This case, although taking somewhat extreme ground, fully sustains the vigorous criticism directed by Mr. Pomeroy against this form of answer. In his work on Code Remedies (3d Ed. § 524) this eminent writer says: "A practice has recently grown up of framing an answer in the following manner: To admit such of the plaintiff's averments, if any, as the facts of the case require; to deny others wholly or partially; to explain and modify others if thought necessary; in short, to unite in one answer or division thereof a mass of special admissions, denials, explanations and affirmative statements, and to include the whole with a sweeping clause somewhat in this form: 'As to each and every other allegation in said complaint not herein expressly admitted or denied or mentioned, the defendant hereby denies the same.' * * * The true spirit and intent of the theory introduced by the reformed procedure plainly demand certainty, precision, and definiteness in the allegations of both parties, and especially in the denials by which the defendant places on the record the exact issues intended to be tried * * * This design of the codes would, however, be utterly defeated if the vicious style of defense thus described should become common; and the courts, it is submitted, ought to have pronounced most emphatically against it when it first made its appearance."

This form of answer, though in a less extreme form than that outlined by Mr. Pomeroy, has usually been held sufficient to raise an issue. See Griffin v. Long Island Railroad Co. (1886), 101 N. Y. 348; Mattoon v. Fremont, etc., R. R. Co. (1894), 6 S. D. 301; Childers v. First Nat. Bank (1896), 147 Ind. 430.

It would seem that this form of denial would be of real advantage in simplifying the pleadings and making definite the issues in one class of cases, namely, where the complaint contains a comparatively small number of allegations which defendant is willing to admit and a comparatively large number which defendant wishes to deny, especially where the answer must be verified.

LEARY v. MORAN.

Supreme Court of Indiana, 1886.

106 Indiana, 560.

ZOLLARS, J. Appellee is charged in the complaint with having converted to his own use 40 bushels of appellant's wheat, of the value of $50. Appellant has assigned as error the overruling of his demurrer to appellee's answer.

The following facts, substantially, are set up in the first paragraph of the answer: The wheat mentioned in the complaint was a part of a crop raised on appellee's farm by a cropper, who was to have the whole crop threshed at his own expense, and deliver to appellee at the machine one-half of the amount in the bushel. After the wheat had

been harvested and ricked, appellant bought the cropper's interest therein at sheriff's sale. After buying this interest he stated to appellee that he could not have the wheat threshed, and it was agreed that appellee should have it done, and that appellant would promptly reimburse him for all outlay in paying hands, and promptly pay him for the boarding of hands, threshers, and horses, and for his own labor. Pursuant to that agreement, appellee had the wheat threshed, and, upon the terms of the agreement, thereby became entitled to receive from appellant $32.75.

Following these averments are the following: "That after said wheat was threshed, and pursuant to an offer of the plaintiff therefor, the defendant took seventeen sacks of the plaintiff's half of said wheat in payment and satisfaction of his bill of charges for his said outlay for said hire of said hands, and for said board of said hands and horses, and for said services of two days of the defendant, which seventeen sacks of wheat constituted the identical wheat mentioned in the complaint."

If the facts thus set up are true, and that they are true is admitted by the demurrer, it is clear that appellee is not guilty of having converted the wheat, as charged in the complaint. The averments are not as specific, in some particulars, as they might be; but they sufficiently show the rights of the parties, their agreement in relation to the wheat, and that in pursuance of that agreement, and in payment of the amount due to appellee for the threshing, it was agreed that he should take the 17 sacks of wheat, and that the amount so taken was the same wheat mentioned in the complaint. These same facts, we think, might have been proven under a general denial.

In order to make his case as alleged in the complaint, appellant was under the necessity of proving that the wheat was not only taken by appellee, but so wrongfully taken as to amount to a conversion. Under a general denial, the defendant may introduce any and all proof that will meet and overthrow what the plaintiff is bound to prove in order to recover. To show that the taking was not wrongful, and that appellee was not, therefore, guilty of a conversion, he might have proven, under a general denial, that the taking was with appellant's consent, and in pursuance of an agreement as set up in the answer. *Searcy v. State,* 93 Ind. 556.

The paragraph of the answer under examination amounts to an argumentative denial, but it is not for that reason insufficient to withstand the demurrer. *Loeb v. Weis,* 64 Ind. 285; *Clauser v. Jones,* 100 Ind. 126; *Dickinson v. Lambert,* 98 Ind. 487.

* * * * * * * * * * *

Judgment affirmed, with costs.[1]

[1] *An argumentative denial,* while subject to motion to strike out or to make more definite and certain (Oren v. Board of Commissioners (1901), 157 Ind. 158), is nevertheless held to raise an issue (Burriss v. People's Ditch Co. (1894), 104 Cal. 248; National Wall Paper Co. v. McPherson (1897), 19 Mont. 355; Cornett v. Smith (1900), 15 Colo. App. 53; Pittenger v. Masonic Relief Ass'n. (1897), 15 N. Y. App. Div. 26.)

See Rand v. Butte Electric Ry. Co. *infra,* p. 624, for a good example of an argumentative denial.

CURNOW v. PHOENIX INSURANCE COMPANY.

Supreme Court of South Carolina. 1895.

46 South Carolina, 79.

March 11, 1896. The opinion of the court was delivered by

Mr. Justice GARY. This is an action on a policy of insurance for $2,500, issued on the 22d day of February, 1889, by the defendant aforesaid, to Mrs. A. J. Levy, on a stock of merchandise contained in a store at Blackville, S. C.

On the 18th day of October, the property covered by the policy was destroyed by fire.

The complaint alleges: (1) The incorporation of the defendant; (2) the issuing of the policy by the defendant; (3) ownership of the insured, and loss; (4) that the said Mrs. A. J. Levy duly fulfilled all the conditions of said insurance on her part, and, more than 60 days before the commencement of the action, gave the defendant due notice and proof of the fire and loss aforesaid, and duly demanded payment of said sum of $2,500; (5) assignment of the policy and moneys due Mrs. A. J. Levy, to the plaintiff, Mrs. Sarah V. Curnow; (6) nonpayment of said loss.

* * * * * * * * * * *

* * * The first paragraph of defendant's answer is as follows: "They deny that A. J. Levy 'duly fulfilled all the conditions of insurance on her part, and, more than sixty days before the commencement of this action, gave due notice and proof of the fire and loss thereunder,' as alleged in paragraph five," etc. This form of denial is termed a "negative pregnant," of which Mr. Pomeroy, in Remedies and Remedial Rights (section 618), says: "Such denial is one pregnant with the admission of the substantial fact which is apparently controverted; or, in other words, one which, although in the form of a traverse, really admits the important fact contained in the allegation. * * * Denials in the form of a negative pregnant arise (1) when the allegation is of a single fact, with some qualifying or modifying circumstance and the traverse is in ipsis verbis, using exactly the same language, and no more; (2) when the allegation is of several distinct and separate facts or occurrences, connected by the copulative conjunction, and the traverse is in ipsis verbis of the same facts and occurrences, also connected by the same conjunction. In most of the reported decisions, the courts have held such form of denial to be insufficient, and have declared that they raised no issues treating the statements of the complaint or petition as actually admitted. This was the universal rule under the old system; and, as it was not based upon any merely technical reasons or doctrine of pleading, the same rule is properly followed under the codes." The same author, in section 619, says: "In an action upon a fire policy against insurers, the defendants moved for leave to file an amended answer. In denying this motion, the court said: 'The denials are all liable to the objection that they are negatives pregnant. The complaint avers that, on a particular day, the property was all destroyed by fire. The answer denies this in the very words of the complaint. Such a denial is a negative pregnant, with the admission that it may have been destroyed on some other day, and that a part of it may have been destroyed on the day named. Such denials have always been held insufficient.' A complaint alleging 'that the proofs of loss were filed with the secretary of the defendant on the 31st of March, 1866,' the denial was that the proofs were filed as alleged in the complaint. This was declared to be pregnant with the admission that they

were filed on another day within the time required." See, also, Enc. Pl. & Prac. p. 796.

* * * * * * * * * * *

GRIMM v. TOWN OF WASHBURN.

Supreme Court of Wisconsin. 1898.

100 Wisconsin, 229.

This is an action brought to recover damages alleged to have been caused to plaintiff's team by reason of the defective condition of a certain bridge in the defendant town. The plaintiff had judgment for $150, from which this appeal is taken.

BARDEEN, J. * * *

Counsel further insist that there is no evidence that the road on which the bridge was situated was a public highway. One answer to this contention is that it is alleged in the complaint to have been on a public highway, and it is not denied. Defendant's counsel attempted to put this fact in issue, but, by an error much more fatal than the "variance" mentioned, he neglected to cover this allegation in his answer except in the manner now to be stated. The allegations of the answer in this respect are as follows: "The defendant, further answering the plaintiff's complaint, denies, on information and belief, that for a great number of years previous to the time, alleged in the plaintiff's complaint, of the injury therein complained of, it had laid out, maintained, and used as a highway the road described in the plaintiff's complaint. Defendant further denies, on information and belief, for twenty years or more, that it kept and maintained several bridges as alleged in the plaintiff's complaint prior to the injury alleged therein, and especially the one so indefinitely described in plaintiff's complaint." The language of this denial is almost precisely the wording of the complaint. A denial that the defendant had laid out, used, and maintained the road in question "for a great number of years" raises no issue; no more does the denial that the town had kept and maintained the bridges "for twenty years or

more." This denial would be perfectly consistent with the fact that the town had kept and maintained the bridges for 19 years. No one could be convicted of perjury who should swear to such a denial. The vice of this pleading is that it is a negative pregnant, a form of pleading which has uniformly been condemned by the courts. Bliss, Code Pl. § 332. The question of the sufficiency of the denial was raised at the trial, and an opportunity to amend was offered to defendant, but declined. The ruling of the trial court that the pleading was bad was unquestionably right.[1]

* * * * * * * * * * *

[1] A negative pregnant raises no issue:—Bourke v. Butte Electric & Power Co. (1905), 33 Mont. 367; Britannia Mining Co. v. U. S. Fidelity & Guaranty Co. (1911), 43 Mont. 93; Kinney v. Maryland Casualty Co. (1911), 15 Cal. App. 571; Scott v. Superior Sunset Oil Co. (1904), 144 Cal. 140; United States v. Larkin (1907), (U. S. C. C. App. Ohio) 82 C. C. A. 247, 153 Fed. 113; Shepard v. Wood (1907), 116 N. Y. App. Div. 861; Knight v. Denman (1903), 68 Neb. 383; Johnson v. Asher (1907), (Ky.) 105 S. W. 943.

In *Missouri* the doctrine of a negative pregnant is not recognized: Cooper v. American Cent. Ins. Co. (1909), 139 Mo. App. 570, 582.

And in *Washington* it is held that the doctrine that a negative pregnant is insufficient and raises no issue, was a technical rule of the common law and has no place under the code. A motion to make the answer more definite and certain is declared to be the proper remedy: O'Brien v. Seattle Ia. Co. (1906), 43 Wash. 217.

(b) Denials of Knowledge or Information.

CHURCH v. HENDRIE & BOLTHOFF MANUFACTURING AND SUPPLY COMPANY.

Supreme Court of Colorado. 1910.

47 Colorado, 544.

Chief Justice STEELE delivered the opinion of the court:

The action was brought to recover the amount due from the corporation of which the defendants were directors, and is based upon the failure of the directors to file the annual statement required by the statute. The answer contains the following:

(1) "As to whether the matters set forth in paragraphs 2, 5, and 6, or any of them, are true, defendants have not and cannot obtain sufficient knowledge or information upon which to base a belief."

The motion of the plaintiffs for judgment upon the pleadings upon the ground, among others, that the answer admitted the allegations of the complaint, was granted, and judgment was thereupon rendered. The defendants have appealed.

In the brief of the appellants it is stated that: "The only issue tendered, which will be here urged, was a statutory denial that the goods, wares, and merchandise were sold and delivered by appellee to appellants." This removes from our consideration all questions save that of determining whether the first paragraph of the answer does or does not tender an issue. In the second paragraph of the complaint, it is alleged that the Western Realty & Paving Company is a corporation organized and existing under and by virtue of the laws of Colorado. The fifth paragraph of the complaint contains the averment that between the 1st of October and the 17th of November, 1904, the plaintiff sold and delivered to the Western Realty & Paving Company, at its special instance and request, certain goods, wares, and merchandise of the value of $127.90 (an itemized account of which is attached to, and made a part of the complaint), and that the said company agreed to pay for the same upon the dates of the delivery of the goods. The sixth paragraph of the complaint avers a demand upon the company, and the defendants, for the payment of the amount, and their refusal.

The matters contained in these paragraphs are those which the defendant sought to traverse in the form prescribed by the code; but the defendants, being officers of the corporation, cannot be heard to say that they "have not and cannot obtain a sufficient knowledge or information upon which to base a belief" with respect thereto because such matters are presumptively within their knowledge. Such a denial tenders no issue and is an admission that the allegations stated the truth. *Fravert v. Fesler,* 11 Colo. App. 387.

The answer not having tendered an issue, judgment upon the pleadings was properly granted.

Affirmed.[1]

Mr. Justice GABBERT and Mr. Justice WHITE concur.

[1] *Accord:* Vadney v. State Board (1911), 19 Idaho 203 (matters of record); Allen v. National Surety Co. (1911), 144 N. Y. App. Div. 509 (matters of record); Mathews v. Pufall (1909), 140 Wis. 655 (matters within personal

knowledge); Bartlett Estate Co. v. Fraser (1909), 11 Cal. App. 373 (matters within personal knowledge); Kentucky Coal Mining Co. v. Mattingly (1909), 133 Ky. 526 (matters within personal knowledge).

WELLES v. COLORADO NATIONAL LIFE ASSURANCE COMPANY.

Supreme Court of Colorado. 1911.

49 Colorado, 508.

Mr. Justice HILL delivered the opinion of the court:

The defendant in error brought this action upon a promissory note. Its complaint alleges its corporate existence; also, that the defendant (plaintiff in error here) made and delivered to Charles N. Settele his certain promissory note in writing, wherein and whereby for value received, he promised to pay to the order of Settele, at a certain time, a certain amount and interest (a copy of the note, with its indorsements, was set forth); that, before its maturity, it was duly indorsed and delivered to the plaintiff who became, and now is, the owner and holder thereof; that no part of said note has been paid; that there is due thereon from the defendant to plaintiff a certain amount, with interest; and prayer for judgment. A demurrer to the answer was sustained. Defendant elected to stand upon his demurrer. Judgment was rendered against him, and he brings the case here for review upon error.

The answer states: First. That as to be corporate existence of the plaintiff, the indorsement of the note to it, and as to it being the owner and holder thereof defendant has not and cannot obtain sufficient information upon which to base a belief, and hence denies these allegations. These denials are not in the form prescribed by the code, and for that reason were not sufficient to constitute a defense. This section requires it to be stated that one has not the knowledge or information upon which to base a belief. The statutes appear to make a distinction between the words "knowledge" and "information." It has repeatedly been held by this court that, in order to take advantage of this privilege in a pleading, the formula prescribed by the code

must be exactly followed, because in no other manner can the defendant satisfy its demands and thereby raise a substantial issue. *James v. McPhee, Assignee,* 9 Colo. 486; *Haney v. People,* 12 Colo. 345; *Grand Valley Irrigation Co. v. Lesher et al.,* 28 Colo. 273; *D. N. D. L. Co. v. Burns,* 30 Colo. 283; *Solomon v. Brodie,* 10 Colo. App. 353.[1] * * *

* * * * * * * * * * *

[1] In Pengelly v. Peeler (1909), 39 Mont. 26, it was held that the omission of the word "thereof" found in the statute did not vitiate the denial, and a number of illustrative examples of good and bad forms are given.

As to the degree of literal accuracy with which the statute must be followed, see Erskine v. Russell (1908), 43 Colo. 449; Milwaukee Gold Extraction Co. v. Gordon (1908), 37 Mont. 209.

SMITH v. ALLEN.

Supreme Court of Nebraska. 1901.

63 Nebraska, 74.

ALBERT, C. The plaintiff, Edward J. Smith, brought this action as trustee of the estate of Philo R. Hurd, deceased, against the defendants W. B. Van Sant, James A. Ollis, G. W. Stancliffe, and others, not necessary to mention, to foreclose a real estate mortgage. The defendant Van Sant filed an answer and cross petition, asking the foreclosure of another mortgage on the same property. The other defendants above named each filed an answer to the petition, but failed to plead to the cross petition. A trial was had, resulting in a finding and decree for the plaintiff and the cross petitioner, in accordance with the prayer of their respective petitions. The case is here on appeal.

One ground urged for a reversal of the decree is that the evidence fails to show that no action at law had been had for the recovery of the debts secured by the respective mortgages. That such fact must be alleged, and, if denied, proved, to warrant a decree of foreclosure, is too well established to admit of controversy. *Jones v. Burtis,* 57 Neb. 604; *Kirby v. Shrader,* 58 Neb. 316; *Miller v. Nicodemus,* 58 Neb. 352. That it was not proved in this case

is conceded. But on behalf of the plaintiff it is urged that such fact is alleged in his petition, and is met by no sufficient denial in the answers. The allegation referred to is made in paragraph 6 of plaintiff's petition. The answers of the appellants, among other things, each contain the following: "Relating to the allegations contained in paragraphs one to ten, inclusive, he (the defendant) has no personal knowledge, and denied each and every allegation therein." Plaintiff contends that a defendant has no right to interpose an unqualified denial, except on positive knowledge, and, lacking positive knowledge, he must deny on information and belief or allege a lack of knowledge or information sufficient to form a belief. That such rule prevails in many of the code states is true; but it is based on a statutory requirement to that effect, which is not to be found in our code of civil procedure. As regards denials, the only requirement of our code is that contained in section 99, which is as follows: "The answer shall contain: First, a general or specific denial of each material allegation of the petition controverted by the defendant. Second, a statement of any new matter constituting a defense, counterclaim or set-off, in ordinary and concise language and without repetition." It will be seen that no specific provision is made for a denial, where the defendant lacks positive knowledge, or upon information and belief. However wise such provision might be, this court has no authority to supply it. Are we to infer, then, from this, that the authors of the code intended to enforce the defendant to the alternative of admitting allegations of the truth of which he had no knowledge, or to verify an unqualified denial of such matters? We think not. It seems to us to be more consistent with the spirit of the code to permit the defendant to spare his conscience by a disclaimer of knowledge, and at the same time enter a denial for the purpose of putting the plaintiff to the proof of his allegations. The denials were sufficient in this case, and the failure of the plaintiff to establish the allegation mentioned is fatal to his decree. The other questions discussed in this connection are not likely to arise on another trial.

* * * * * * * * * * *

AMES and DUFFIE, C. C., concur.

BY THE COURT: For the reasons stated in the foregoing

opinion, * * * that portion of the decree in favor of the plaintiff is reversed, and the cause remanded for further proceedings according to law.

(c) Issues Raised by Denials.

BAXTER v. ST. LOUIS TRANSIT COMPANY.

Supreme Court of Missouri. 1906.

198 Missouri, 1.

VALLIANT, J. Plaintiff, a minor, received personal injuries in a collision with a street car which was being operated by defendant, and sues to recover damages for the injuries, alleging that the collision was the result of the negligent operating of defendant's street car. He recovered a judgment for $4,750, and defendant appealed.

1. Before entering into a consideration of the merits of the case there is a question at the threshold that demands our attention.

The petition alleges that the plaintiff is a minor, and that the St. Louis Trust Company, by whom as his curator he sues, is his legally appointed and duly qualified curator, that the defendant is a corporation operating a street railroad, then it proceeds to state the cause of action. The answer of the defendant was a general denial, and a plea of contributory negligence. At the trial there was no proof of the appointment of the alleged curator. It is contended by defendant that the failure of proof on that point is fatal to the plaintiff's right of recovery.

At common law the character in which the plaintiff sued was not put in issue unless specially denied. 1 Chitty on Pl. (16th Am. Ed.) p. 464. In such case a special denial was in the nature of a plea in abatement. Stephens on Pl. (1894) p. 467. Such a plea, if sustained, did not bar the cause of action, but abated that suit. The character in which the plaintiff assumes to sue is entirely distinct for the cause of action alleged; for example, a plaintiff assuming to be the administrator sues to recover a debt due the estate, he may not be the administrator and therefore not

entitled to maintain the suit, yet a judgment that the plaintiff in that suit is not the administrator would be no bar to an action to recover the same debt when the true administrator should sue. And that is as true under our code of procedure as it was at common law. In so far as the science of pleading rests on sound reason for its rules, there is no difference between our system and the system of common-law pleading, the conclusions of reason and common sense are the same, but in each system there are arbitrary rules and the difference between the two systems appears in those rules. For example, it is neither illogical nor unreasonable, nor violation of any scientific principle to allow a defendant to plead in abatement of the suit and in bar of the action at the same time; there is nothing inconsistent or contradictory in those pleas with each other, both may be true or one may be true and the other not, and there is no difficulty in shaping the judgment to suit the facts as they may be found on the trial. Yet the common-law rule is that the two pleas cannot stand together, but under the code system the defendant not only may but is required to plead them both in one answer if he intends to avail himself of both. The rule on this point is thus stated in Bliss on Code Pleading (3d Ed.) § 345. "In common-law pleading we have the rule that 'pleas must be pleaded in due order,' that is, the dilatory pleas must be first made and disposed of, to be followed by pleas in bar. The code requires the defendant either to demur or answer, and in his answer he is allowed to set up as many defenses as he may have. Only one answer is contemplated and all the defenses which he elects to make must be embraced within it."

Matters in abatement and matters in bar are as essentially different under the one system as under the other, and the effect of matters in abatement is the same under both systems; that is, if the plea is sustained it abates that suit without affecting the cause of action, the only difference is that at common law it is called a "plea in abatement" and must be disposed of before defendant pleads to the merits of the action, while under the code it goes under the general name of "defense" and may be pleaded in the same answer with a plea to the merits. The author just quoted, discussing the effect of an insufficient statement in the petition of the character in which the plaintiff sues, and holding that such defect is not reached by a general de-

murrer, says: "It is but reasonable, then, that the statute should require the defendant, if he objects to the plaintiff's demand, because he does not show a right to appear in court, to base his objection specifically upon that ground; and I know of no comprehensive phrase that so well describes the ground of objection as a want of legal capacity to sue." Bliss on Code Pl. (3d Ed.) p. 620, § 408. In other words, if the capacity in which the plaintiff assumes to sue is defectively stated, the defect cannot be reached by a general demurrer, which goes to the cause of action, but it requires a special demurrer.

Pomeroy, a strong friend of the code system, after first pointing out the distinction between a plea in abatement and a plea in bar in respect of the order in which they were required to be pleaded, says: "There are in the new procedure no such divisions and classes. Defenses still exist of the same essential nature as to those which were formerly set up by means of a plea in abatement, and a judgment thereon in favor of the defendant does not forever bar the plaintiff from the further prosecution of his demand." Pomeroy, Code Rem. (4th Ed.) pp. 799, 800. The learned law-writer, although he regards the codes as in itself a complete system depending for nothing to the common law (Id. p. 541, § 409), yet, in the words just quoted he recognizes fully as it is recognized at common law the essential difference between matters that may be pleaded to abate the suit, and matters pleaded to defeat the cause of action, the only difference between the code and the common law in respect to them being the manner and the order in which they are pleaded, and the issues tried. And on pages 813, 814, he says: "The nonjoinder of necessary parties cannot be proven under the general denial. * * * The defense that the plaintiff is not the real party in interest is new matter, * * * and in an action by an executor or administrator the general denial does not put in issue the plaintiff's title to sue."

As we have already above shown when a plaintiff sued at common law in a representative capacity, as executor or such like, and defendant, without any denial of the plaintiff's alleged character, filed his plea to the merits of the action and went to trial, he was presumed to have admitted the character assumed by the plaintiff.

There was no injustice to the defendant in that rule of

pleading, for, if he really intended to question the matter, he could, by a special plea, require the plaintiff to produce the proof. It is the boast of the advocates of the code system that it is designed to reach more quickly the merits of a controversy by cutting away from the unnecessary forms and technicalities of the common law, but if our system puts the plaintiff to such proof when it is not specially called for by the defendant's answer, we are more formal and technical than were our common-law predecessors.

* * * * * * * * * * *

The first case in which the precise question we now have come before this court for decision was *Rogers v. Marsh,* 73 Mo. 64, in which this court, per NAPTON, J. (who also wrote the opinion in the *Porter Case* above mentioned), said: "It is also claimed that the answer denied each material allegation of the petition, and as no evidence was offered to show the appointment of the next friend for the two of the plaintiffs who are minors, the judgment should be reversed. This is virtually an objection that the proper parties are not made plaintiffs, and such objection if not made either by demurrer or answer, is waived under the statute, and cannot be made in the motion in arrest. The answer should have set this matter up, and it not having been done, the objection now made cannot be considered. Judgment affirmed, in which all concur."

* * * * * * * * * * *

Our conclusion is that under sections 598, 599, and 602, Rev. St. 1899, when a plaintiff assumes to sue in a representative capacity, that capacity can be put in issue in two ways only, first, if in the body of the petition facts sufficient to constitute the capacity are not stated the issue may be raised by a special demurrer; second, if the facts to constitute the capacity are sufficiently stated, they may be put in issue by a specific denial, but the issue is not raised in either case by a general demurrer or a general denial.

It being averred in the petition in this case that the St. Louis Trust Company was the lawfully appointed and duly qualified curator of the plaintiff, and there being no specific denial of that fact, it must be taken as admitted. The court did not err, therefore, in refusing the instructions asked by defendant in the nature of a demurrer to the evidence because of failure of proof on that point.

* * * * * * * * * * *

We find no error in the record, and the judgment is therefore affirmed. All concur.[1]

[1] *Accord:* Levels v. St. Louis & Hannibal Ry. Co. (1906) 196 Mo. 606; Dutcher v. Dutcher (1876), 39 Wis. 651. This rule is sometimes statutory: Krause v. Modern Woodmen (1907), 133 Iowa 199.

WIEDEMAN v. HEDGES.

Supreme Court of Nebraska. 1901.

63 Nebraska, 103.

HOLCOMB, J.: In the court below the defendant in error (plaintiff therein) began an action for the recovery of the value of certain material alleged to have been sold the defendant (plaintiff in error), under a verbal contract, to be used in the manufacture of certain machinery by the defendant and others associated with him, which material, at the defendant's request, was furnished to the foreman engaged in the manufacture of such machinery. The answer was a general denial. Verdict and judgment were rendered against the defendant, and to secure the reversal thereof he prosecutes error to this court.

On the trial the defendant offered evidence tending to prove that he and others, as partners, were engaged in the manufacture of the machinery referred to, and that the material for which the suit was brought was contracted for by the partnership, and sold to it by the plaintiff, and not to the defendant individually. All such evidence was excluded on the objection of the plaintiff, and the rulings thereon duly excepted to by the defendant. By these rulings error was committed, to the defendant's prejudice. Evidence tending to prove that the contract pleaded in the petition, and relied upon by the plaintiff as his cause of action, was made with, and the material sold to, the partnership, it occurs to us, would controvert and rebut the facts which the plaintiff must establish in order to maintain his action, and, if so, the offered testimony was admissible under a general denial. *Broadwater v. Jacoby,* 19 Neb. 77; 1 Am. & Eng. Pl. & Prac. p. 818, and authorities

there cited. If suit is brought against A. for goods alleged to have been sold him, it would seem that the facts necessary to be established under the petition before a recovery could be had could hardly be more directly controverted than by evidence establishing the fact that the contract was made with, and the goods sold to, B., and all such testimony is admissible under a general denial.

The learned trial court, it appears, took the view that the defendant's liability was collateral, in that he had assumed and agreed to pay for the goods sold the partnership, and it was immaterial who was liable on the original undertaking. But counsel for plaintiff contends that the suit is founded on an original undertaking of the defendant, who thereby became a debtor by virtue of a contract entered into whereby he bought and agreed to pay for the material in the first instance, and to whom alone credit was extended, and the petition is evidently framed on that theory. The defendant's liability under the allegations of the petition, if existing, is that of a principal debtor on an original and independent undertaking; and, to relieve himself of the alleged obligation, he should, under his general denial, be permitted to offer evidence tending to prove that the contract sued on was made with, and the goods sold to a third party.

For the reason stated, the judgment must be reversed, and the cause remanded for further proceedings.

Reversed and remanded.

WILSON v. CHARLESTON AND SAVANNAH RAILWAY.

Supreme Court of South Carolina. 1897.

51 South Carolina, 79.

Nov. 4, 1897. The opinion of the court was delivered by Mr. Justice GARY. This action was commenced on the 26th of April, 1895, and was tried before his honor, Judge D. A. TOWNSEND, at the November, 1896, term, of the court for Charleston county. The jury rendered a verdict in

favor of the plaintiff for $690.50. The defendant has appealed to this court on exceptions which, together with the complaint, answer, and charge of the presiding judge, will be set out in the report of the case. The third exception was abandoned. The exceptions will not be considered *seriatim*, as they raise practically but three questions, which will be hereinafter stated.

The first question raised by the exceptions is: Was there error on the part of the presiding judge in excluding testimony offered in behalf of the defendant for the purpose of showing that the injury was caused by the negligence of a fellow servant, "on the ground that it referred to the defense of co-employe, which could not be raised under the pleadings?" The complaint alleges negligence in the following particulars, to wit: (1) That the yard master of said company, who is charged with the direction and control of all switch engines and the making up of trains within the said yard limits of the defendant, was, at the time of the said accident, carelessly and negligently absent from his post. (2) That the hostler and switchman in control of the switch engine to which the said baggage car was attached carelessly and negligently uncoupled it from the tender, while moving at a rapid and dangerous speed down the main line, on which the plaintiff's car was. (3) That there was no brakeman or other attendant on or in charge of the said baggage car, as was customary in the making up of trains. The "case" shows that the following took place while Mr. C. S. Gadsden, a witness for the defendant, was being examined by defendant's attorney, to wit: "Q. Something was said about the yard master. Is it his duty to be present at the making up of trains? A. He may or may not, as he sees proper. Q. Under whose control are all these people? (Question objected to on the ground that it referred to the defense of co-employe, which could not be raised, under the pleadings. Objection sustained. Ruling excepted to.)" Not only was the testimony which the defendant offered to introduce admissible on the ground that it was responsive to the allegations of the complaint that the yardmaster was "charged with the direction and control of the movement of all switch engines and the making up of trains within the said yard limits of the defendant," but it was also competent for the purpose of showing a failure of negligence on the part of the de-

fendant, by establishing the fact that the injury was caused by the negligence of a fellow servant. Section 671, Pom. Rem., contains the following: "* * * Evidence which is in its nature affirmative is often confounded with defenses which are essentially affirmative, and in avoidance of the plaintiff's cause of action, and is therefore mistakenly regarded as new matter, requiring to be specially pleaded, although its effect upon the issues is strictly negative, and it is entirely admissible, under an answer of denial. In other words, in order that evidence may be proved under a denial, it need not be, in its nature, negative. Affirmative evidence may often be used to contradict an allegation of the complaint, and may, therefore, be proved to maintain the negative issue raised by the defendant's denial. One or two familiar examples will sufficiently illustrate the propositions. In certain actions, property in the plaintiff, in respect of goods which are the subject-matter of the controversy, is an essential element of his claim. His complaint, therefore, avers property in himself. The allegation is material, and is, of course, put in issue by the general or specific denial. To maintain this issue on his part the plaintiff may give evidence tending to show that he is the absolute owner, or has the requisite qualified property. The defendant may controvert this fact in two modes. He may simply contradict and destroy the effect of the plaintiff's proof, and in this purely negative manner procure, if possible, a decision in his own favor upon this issue. The result would be a denial of the plaintiff's recovery by his failure to maintain the averment of his pleadings; but the jury or court would not be called upon to find that the property was in any other person. The decision would simply be that the plaintiff had not shown it to be in himself. On the other hand, the defendant, not attempting *directly* to deny the testimony of the plaintiff's witnesses, and to overpower its effect by *directly* contradictory proof, may introduce evidence tending to show that the property in the goods is, in fact, in a third person. This evidence, if convincing, would defeat the plaintiff's recovery. It would be affirmative in its *direct* nature, but its ultimate effect in the trial of the issue raised by the answer would be to deny the truth of the plaintiff's averment. Such evidence, although immediately affirmative, would still, for the purpose of determining the issue presented by the plead-

ings, be negative. * * *" Section 675 of the same author contains the following, to wit: "In actions for injuries to person or property, alleged to have resulted from the defendant's negligence, he may prove, under a general denial, that the wrong was caused by the negligence of third persons, not agents of the defendant, and for whom he was not responsible. * * *" In the case of *Sheehan v. Prosser*, 55 Mo. App. 569, Mr. Justice BIGGS, in delivering the opinion of the court, said: "The defense that the plaintiff was injured through the negligence of a fellow servant was available to the defendant without having been specially pleaded. Proof of that fact necessarily disproved the averment that the plaintiff was injured through the negligence of the defendant." This view is sustained by *Express Co. v. Darnell*, 31 Ind. 20. The authorities are, however, conflicting, as will be seen by reference to the case of *Conlin v. Railroad Co.*, 36 Cal. 404, which sustains a contrary doctrine. The reason why testimony is admissible, under a general denial, to prove that the injury was caused by the negligence of a fellow servant is because its tendency is to show that there was no negligence whatever on the part of the defendant. On the other hand, the reason why it is necessary to set forth in the answer the defense of contributory negligence on the part of the plaintiff is because testimony showing such contributory negligence does not disprove the allegations of the complaint that the injury was caused by the negligence of the defendant. The defendant, by setting up in his answer the defense of contributory negligence on the part of the plaintiff, does not attempt to escape liability by showing a failure of negligence on his part, but because the plaintiff has done that which prevents a recovery against him, although he (the defendant) may have been guilty of negligence. Such facts would constitute an affirmative *defense*, of which the defendant could not get the benefit, unless it was set up in the answer. The exceptions raising the first question are sustained.[1]

* * * * * * * * * * *

[1] *Accord:* Roberts v. Virginia-Carolina Chemical Co. (1909), 84 S. C. 283, 66 S. E. 298; Kaminski v. Tudor Iron Works (1902), 167 Mo. 462.

DUFF v. WILLAMETTE STEEL WORKS.

Supreme Court of Oregon. 1904.

45 Oregon, 479.

Mr. Justice BEAN delivered the opinion.

Several points are made in the brief, and were urged at the argument, which are all grounded substantially on the contention that the court erred in instructing the jury that Hylander was a fellow servant of the deceased, and that plaintiff could not recover if the accident was caused by the negligence of Hylander. The question thus raised involves two inquiries: (1) Was Hylander in fact a fellow servant of the deceased? (2) Is the defense that the injury was the result of a fellow servant's negligence available to the defendant unless pleaded?

At the time of the accident, Hylander and the deceased were both engaged in the discharge of the duties of operatives. Hylander was not charged with the performance of any duty that the master owed to the deceased. It was not his business to provide a reasonably safe place in which the deceased could work. That duty had been entrusted by the defendant to other employes, and not to Hylander. Under the decisions, therefore, Hylander was a fellow servant of the deceased, for whose negligence the defendant is not liable to the plaintiff. *Mast v. Kern*, 34 Or. 247, 54 Pac. 950, 75 Am. St. Rep. 580; *Johnson v. Portland Stone Co.*, 40 Or. 436, 67 Pac. 1013, 68 Pac. 425. In *Anderson v. Bennett*, 16 Or. 515, 19 Pac. 765, 8 Am. St. Rep. 311, the injury occurred through the negligence of one who was charged with the performance of the master's duty; while here the alleged negligent servant was a mere co-employe of the deceased, working at the time of the accident in a common employment. If the injury, therefore, was in fact due to his negligence, and not that of some agent or employe acting for the master, the defendant is not liable.

Upon the second question the authorities are in conflict. 13 Enc. Pl. & Pr. 913. In some jurisdictions it is held that the defense that the injury complained of was due to the negligence of a fellow servant may be made under a mere denial of the negligence charged in the complaint. *Vinson*

v. Morning News, 118 Ga. 655, 45 S. E. 481; *Sheehan v. Prosser,* 55 Mo. App. 569; *Wilson v. Charleston & Savannah R. Co.,* 51 S. C. 79, 28 S. E. 91; *Sayward v. Carlson,* 1 Wash. 29, 23 Pac. 830. But other decisions hold that the defense, to be available, must be pleaded. *Conlin v. San Francisco, etc., R. Co.,* 36 Cal. 404; *Bjorman v. Fort Bragg Redwood Co.,* 104 Cal. 626, 38 Pac. 451; *Gibson v. Sterling Furniture Co.,* 113 Cal. 1, 45 Pac. 5; *Layng v. Mt. Shasta Mineral Spring Co.,* 135 Cal. 141, 67 Pac. 48; *Higgins v. Missouri Pacific R. Co.,* 43 Mo. App. 547; *Kerr-Murray Mfg. Co. v. Hess,* 98 Fed. 56, 38 C. C. A. 647. So far as we are informed the question has never before been presented to this court. In our opinion, the latter rule is more in harmony with the spirit and purpose of the code and the previous decisions of the court than the former. The statute requires the answer to contain a general or specific denial of every material allegation controverted by the defendant, and the statement of any new matter constituting a defense or counterclaim. B. & C. Comp. § 72. The purpose of this provision is to require the answer to notify the plaintiff of the facts intended to be relied upon for a defense, so that he may prepare to meet them on the trial, and also to confine the inquiry on the trial to the issues actually made. *Troy Laundry Co. v. Henry,* 23 Or. 232, 31 Pac. 484. The statute has always been rather strictly construed, the court holding that evidence is inadmissible, under the denials, of facts which attempt to avoid the force and effect of the cause of action alleged in the complaint, such as contributory negligence, fraud, payment, estoppel, and the like, which must be affirmatively pleaded. *Rugh v. Ottenheimer,* 6 Or. 231, 25 Am. Rep. 513; *Remillard v. Prescott,* 8 Or. 37; *Grant v. Baker,* 12 Or. 329, 7 Pac. 318; *Guille v. Wong Fook,* 13 Or. 577, 11 Pac. 277; *Benicia Agri. Wks. v. Creighton,* 21 Or. 495, 28 Pac. 775, 30 Pac. 676; *Clark v. Wick,* 25 Or. 446, 36 Pac. 165; *Coos Bay R. Co. v. Siglin,* 26 Or. 387, 38 Pac. 192; *Farmers' National Bank v. Hunter,* 35 Or. 188, 57 Pac. 424.

It is argued, however, in support of the position that the negligence of a fellow servant may be shown without pleading it, that the tendency of such evidence is to prove that there was no negligence whatever on the part of the defendant. If such be the effect of the evidence, it would be admissible under the denial, because the defendant has a

right to give evidence under his denial controverting any fact necessary to be established by the plaintiff to authorize a recovery. Bliss, Code Pl. (2d Ed.) §§ 330, 337; Pomeroy, Code Rem. (4th Ed.) § 664; *Buchtel v. Evans,* 21 Or. 309, 28 Pac. 67. But we do not understand that the plaintiff is required to allege or prove, in the first instance, that the injury was not due to the negligence of a fellow servant, nor would evidence of such negligence controvert any fact necessary to be established by the plaintiff in order that he may recover. The fact that the injury resulted from defendant's negligence is put in issue by the denial. Defendant, therefore, may show affirmatively under the denial that the injury arose from some other cause, such as the act of some person not its agent or employe. When, however, the defense admits that some agent or employe of the defendant was negligent, but tends to show that plaintiff has no cause of action, because the negligent agent or employe was a fellow servant with the injured party, such defense, it seems to us, is new matter, and ought, under our system, to be pleaded.

The defense of negligence of a fellow servant is, in effect, a plea of confession and avoidance. It amounts to nothing more than an admission by the defendant that one of its servants has been negligent, and an assertion that the plaintiff cannot recover on account thereof because of the relation sustained by him to the negligent servant. Such an admission would make the defendant liable under some circumstances and to some persons for the act of the negligent servant, but not to the particular servant injured, because of the rule of law alluded to. Proof that the injury resulted from the negligence of a fellow servant does not show or tend to show that the plaintiff's statements are untrue, nor does it show a want of negligence on the part of the defendant, but simply indicates a reason why the plaintiff cannot recover, notwithstanding such negligence, and ought to be pleaded.

Judgment reversed and a new trial ordered.

Reversed.[1]

[1] *Accord:* Longpre v. Big Blackfoot Milling Co. (1909), 38 Mont. 99; Laying v. Mt. Shasta Mineral Spring Co. (1901), 135 Cal. 141; Chicago, B. & Q. Ry Co. v. Oyster (1899), 58 Neb. 1.

MULTNOMAH COUNTY v. WILLAMETTE TOWING COMPANY.

Supreme Court of Oregon. 1907.

49 Oregon, 204.

This is an action to recover damages caused by the steamship Almond Branch fouling the Morrison street bridge. The Almond Branch is an English ship of 3,461 tons register, and was in Portland under charter to the Pacific Export Lumber Company. On February 19, 1901, she had taken part of a cargo of lumber at a dock south of Morrison street, and her captain was directed by the charterer to drop down to the North Pacific Lumber Company's dock to receive the remainder. To do so it was necessary to pass through the draws of both the Madison and the Morrison street bridges. The river at the time was 14 feet above low water, and there was a current of about 3 miles an hour. The captain requested the lumber company to secure two towboats to assist in taking the vessel through the harbor, but the steamer Vulcan, of which defendant Mitchell was captain, belonging to the Willamette & Columbia River Towing Company, was the only one available, and with her lashed to the port side aft of the Almond Branch to assist in steering, the voyage was begun with the defendant Emken as pilot. The vessels passed safely through the draw of the Madison street bridge, but, while backing through the draw at Morrison street, the Almond Branch fouled the bridge and injured it to such an extent that the plaintiff county was compelled to and did pay out $5,682.82 for necessary repairs. This action is brought by the county, the owner of the bridge, against the towing company, William Mitchell, captain of the Vulcan, Harry Emken, the pilot, and the Pacific Export Lumber Company, the charterer of the Almond Branch, to recover treble the amount of such damages, under section 4044, B. & C. Comp.

* * * * * * * * * * *

The Vulcan, of which Mitchell was captain, and which belonged to the towing company, was not furnishing the power for or towing the Almond Branch at the time of the accident, but was lashed to her for steering purposes only.

The Almond Branch was proceeding under her own steam, but as she was a propellor, and could not steer herself while backing, the Vulcan was lashed to her by direction of those in charge for that purpose. The Vulcan and her captain were under orders from the bridge of the Almond Branch, and there is no evidence that such orders were not strictly obeyed, or that any act of omission or commission of the Vulcan or her captain in anyway contributed to the injury to plaintiff's bridge, unless it was in participating in a negligent voyage. The defendant Emken was the pilot of the Almond Branch, and the testimony of himself and the witness Lewis, who was on the vessel, was to the effect that, while she was passing through the draw, her master, who was in command, without direction from the pilot, or without his knowledge, gave an order to the engine room to go full speed ahead, without communicating that fact to the Vulcan, which was backing, the result of which was to cause the Almond Branch to swing to port and foul the bridge. This testimony is undisputed, and it is but a fair inference from it that the proximate cause of the injury was the act of the master referred to, and not the negligence of any of the defendants to the present action. Upon such a record the court was clearly justified in setting aside the verdict and granting a new trial.

Counsel argues, however, that evidence of the negligence of the master was not competent under the pleadings, and cites authorities which seem to hold that in collision cases the defendant cannot rely on a general denial, but must set up by way of answer the circumstances relating to the collision. *The Why Not,* L. R. 2 Adm. & Ecc. 265; *The Washington Irving,* Abb. Adm. 336, Fed. Cas. No. 17,243. But the cases referred to were in admiralty, and, whatever the proper rule may be in such proceedings, it can have no application here. This is an ordinary action for negligence, and in such case it is competent, under a general denial, for the defendant to show that the acts upon which it is based were done by other persons for whose negligence it was not liable. 14 Enc. Pl. & Pr. 344; Bradner, Ev. (2d Ed.) 46. Thus, in an action to recover for an injury to plaintiff's house, caused by negligent blasting, the defendant was permitted to show under general denial that the blasting was done by an independent contractor over whom

he had no control. *Roemer v. Striker,* 142 N. Y. 134, 36 N. E. 808.

The rule is that any fact which in effect admits the cause of action set out in the complaint, but attempts to avoid its force and effect, must be affirmatively pleaded; but evidence which merely controverts facts necessary to be proved by the plaintiff to authorize a recovery must be shown under the denials. *Buchtel v. Evans,* 21 Or. 309, 26 Pac. 67; *Duff v. Willamette Steel Works,* 45 Or. 479, 78 Pac. 363, 668. The averment that the injury to plaintiff's bridge was due to the negligence of defendants was put in issue by the answer, and they were therefore entitled to show affirmatively under their denials that they exercised due care, and that the injury arose from some other cause, such as the act of some person for whom they were not responsible. *Hunter v. Lumber Co.,* 39 Or. 448, 65 Pac. 598. Nor were they deprived of this right because the answers as filed set up other reasons for the accident. The complaint and answers made an issue upon the question of negligence. The burden of proof was upon the plaintiff to show the negligence charged, either directly or by inference, and any testimony which would tend to controvert the plaintiff's case was competent under the denials. * * *

* * * * * * * * * * *

From a careful examination of the entire record, we are satisfied that there was no error, and that the judgment must be affirmed.[1]

[1] In Overhouser v. American Cereal Co. (1905), 128 Iowa 580, it was held that where two parties are sued jointly in tort, one may show under a general denial that the negligence was wholly that of the other defendant, acting in the capacity of an independent contractor.

A BROADER RULE as to the scope of the general denial is often stated in general terms. Thus, in Hellmuth v. Benoist (1910), (Mo. App.), 129 S. W. 257, the court said: "Under a general denial, defendant may prove any state of facts which tend to show that plaintiff never had a cause of action, and this marks the distinction between evidence that is admissible under a general denial, and that which, to be admissible, must be made so by special plea. If the plaintiff ever had a cause of action, and, for any reason, his right to recover has been extinguished, then the facts which go to defeat his cause of action must be pleaded, but, if it be true that he never had a cause of action, then any facts which go to show that he did not have may be shown under the general denial." The same rule was stated in Hill-Dodge Banking Co. v. Loomis (1909), 140 Mo. App. 62, giving illegality as an illustration of a defense admissible under a general denial. But this is obviously too broad a rule. Illegality is not admissible under a general denial, even in Missouri (School District v. Sheidley (1897), 138 Mo. 672). Under such a rule contributory negligence would be admissible under a denial, but such is not true, even in Missouri, (Ramp v. Metropolitan Street Ry. Co. (1908), 133 Mo. App. 700, given in the text, *infra.*)

JONES v. EL RENO MILL AND ELEVATOR COMPANY.

Supreme Court of Oklahoma. 1910.

26 Oklahoma, 796.

KANE, J.: This was an action to recover a balance alleged to be due on an open account, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below. The petition alleged, in substance, that the plaintiff sold and delivered to the defendant certain merchandise amounting to the value of $864.85; that the defendant paid on said account the sum of $390.68, leaving unpaid thereon the sum of $474.17. The answer was a general denial. There was judgment for the plaintiff in the court below, to reverse which this proceeding in error was commenced.

At the trial the court refused to permit the defendant to introduce evidence tending to prove the payment of certain items of the account stated, whereupon he asked leave to amend his answer by setting up said payments, which was refused. The points made by counsel for plaintiff in error are: (1) That the court erred in refusing evidence of the payments under the general denial; and (2) that the court erred in refusing to permit the defendant to file an answer during the trial setting up such payments. Counsel for plaintiff in error contend that where the action is merely for an alleged existing balance due at the time of the institution of the suit, without reference to the extent or amount of original liability, evidence of payment is admissible under the general denial, and cites *Quin v. Lloyd,* 41 N. Y. 349, and *White et al v. Smith,* 46 N. Y. 418. Those authorities seem to sustain the contention of counsel.

Quin v. Lloyd, supra, was an action to recover for work and labor. The complaint stated the contract, the performance of the services, the stipulated price, and that on a certain day named the defendant was indebted to the plaintiff in the sum of $333, being the balance remaining due after sundry payments, made by the defendant to the plaintiff. The answer was a general denial, under which the court held that the defendant could offer proof of payments. In that case WOODRUFF, J., said it was not necessary "for the plaintiff to sue for a balance as such; he might

allege the contract, performance on his part and claim payment; and then, if the defendant desired to prove payments, he must allege payment in his answer; but, where the plaintiff sues for a balance, he voluntarily invites examination into the amount of indebtedness, and the extent of the reduction thereof by payments."

White v. Smith, supra, was also an action for work and labor, in which the complaint alleged the services to a specified amount in value, and that there was a balance due the plaintiff, after deducting all payments made by defendant to plaintiff thereon, of $175. The general denial, it was held, entitled the defendant to prove all the payments which he had made.

In 16 Enc. of P. & P. 181, this question is discussed as follows:

"Payment in such cases, it will be seen, is in no proper sense new matter; the action being expressly brought on the liability for the existing balance claimed. It is true that the liability sought to be enforced is part of the original liability; and it is apprehended that if the plaintiff had proceeded therefor, ignoring the partial payments, it would be necessary for the defendant to plead payment in order to introduce evidence of any payments made after the breach of the contract or maturity of the debt."

In the instant case it is alleged "that there has been paid and credited on said account the sum of $390.68, leaving unpaid thereon the sum of $474.17, which amount became due and payable on and prior to," etc. If plaintiff had sued for the balance, ignoring the partial payments, it would have been necessary for the defendant to plead payment in order to introduce evidence of any payments made, and the cases cited by his counsel to the effect that payment is an affirmative defense which must be pleaded would be in point.

The judgment of the court below is reversed, and the cause remanded, with directions to proceed in conformity with the views herein expressed.

All the justices concur.

BARKER v. WHEELER.

Supreme Court of Nebraska. 1901.

62 Nebraska, 150.

SULLIVAN, J.: Bert Glendore Wheeler sued the plaintiffs in error as sureties upon an official bond, and obtained judgment against them. The petition alleges that one James W. Eller was county judge of Douglas county during the term ending January 3, 1894; that the defendants George E. Barker and William S. Rector were the sureties upon his official bond; that Eller in his official capacity received certain money belonging to the plaintiff, and converted the same to his own use. The answer admits that Eller was county judge, and that defendants were his sureties, but denies in general terms the other averments of the petition. The only assignment of error with which we have to deal calls in question a ruling of the trial court excluding evidence tending to show that Eller, while he was yet judge of the county court, paid the plaintiff's money to her duly appointed guardian. The correctness of this ruling depends upon whether, in actions of this kind, evidence of payment is admissible under a general denial. It is settled doctrine in this state that, in actions to recover money claimed to be due upon ordinary contracts, the general denial is the code equivalent of the common-law plea of nonassumpsit, and hence does not put the allegation of nonpayment in issue. *Magenau v. Bell,* 14 Neb. 7; *Clark v. Mullen,* 16 Neb. 481; *Lamb v. Thompson,* 31 Neb. 448; *Lewis v. Lewis,* 31 Neb. 528; *Live Stock Co. v. May,* 51 Neb. 474; *Hudelson v. Bank,* 51 Neb. 557. These cases recognize no distinction between payment according to the terms of the contract and payment after breach of the contract, and one of them at least (*Clark v. Mullen,* 16 Neb. 481), is a direct adjudication to the effect that payment at the time the goods were sold and delivered, and before a cause of action arose, could not be shown unless specially pleaded. But neither this court, nor any other, so far as we know, has ever held, in an action on an official bond or other bond of indemnity, that the plaintiff was, by a general denial, relieved of the necessity of proving the loss or injury out

of which arose his right of action. The defendants did not by their bond become indebted to the plaintiff. They assumed no specific obligation to her which they were bound at all events to discharge, by payment or otherwise. Their promise, given to the county of Douglas, was to make good any loss that the public or individuals might sustain by reason of the official misconduct of Eller. This being so, it would be illogical—it would be inconsistent with reason and common sense—to hold that a general denial, like the plea of nonassumpsit, put in issue nothing but the execution of the bond. An offer to prove payment is not in every case in implied admission that the plaintiff once had an actionable demand against the defendant; its purpose may be, as in this case, to prove that a right of action never existed. Eller received the money in question rightfully. His possession of it as county judge was lawful, and there is no presumption that he was guilty of official misconduct. The allegation of conversion was, therefore, a material one, and it was not admitted by the general denial. Payment was not new matter, within the meaning of section 99 of the Code of Civil Procedure, for it was offered, not to show the discharge of an obligation that once existed, but to show that the bond had not been forfeited, as alleged, that Eller had not been guilty of official misconduct, that the plaintiff had not been injured; in short, that one of the essential averments of the petition was not true. In *State v. Peterson* (Mo. Sup.), 39 S. W. 453, which was an action upon an official bond, the court, speaking by MACFARLANE, J., said that "in cases in which nonpayment is a material fact necessary to constitute a cause of action, it must be alleged and proved as part of plaintiff's case, and defendant can controvert it, under a general denial, by proof that payment was made."

Other cases to the same effect are *Manufacturing Co. v. Tinsley,* 75 Mo. 458, and *Knapp v. Roche,* 94 N. Y. 329. The case of *Hudelson v. Bank, supra,* does not at all support the position for which the plaintiff contends. It merely decides that, in an action by a mortgagee for possession of mortgaged chattels, an allegation of nonpayment of the mortgage debt is indispensable. The legal effect of a general denial was not determined, nor was there any occasion to consider the question, as the statute declares the effect of such a denial in actions of replevin.

The judgment heretofore rendered in this court is set aside, the judgment of the district court is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

SORENSON v. TOWNSEND.

Supreme Court of Nebraska. 1906.

77 Nebraska, 499.

ALBERT, C.: The plaintiff (appellee) brought this suit to recover the balance due on an alleged express contract of service. He alleges in his petition that in November, 1902, he entered into an oral contract with the defendants, whereby the defendants agreed to pay him the sum of $60 for the service of himself and team; and under and by virtue of said contract the plaintiff served the defendants by himself and team, from the 15th day of November, 1902, to the 10th day of June, 1903, and duly performed all his part of said contract. But one of the defendants answered, and his answer is as follows: "Comes now the defendant Erwin Townsend and, answering plaintiff's petition for himself and no one else, says: * * * (3) Further answering plaintiff's petition this defendant says he denies each and every material allegation in plaintiff's petition not herein specifically admitted. * * * The plaintiff declared on an express contract. The contract is, in effect, that the plaintiff undertook to work for the defendants for an indefinite length of time for $60 per month, and that in pursuance thereof he worked for them a certain length of time. The burden was upon him to establish those facts. When he had made a prima facie case, it was perfectly competent for the defendant to overcome it by showing that the contract, instead of being for an indefinite period, was for a period of one month, and that the services rendered after the expiration of that month were rendered under a new contract, whereby the plaintiff instead of receiving $60 a month was to receive $40. This evidence was competent under defendant's general denial because it is well settled

that, in an action upon a contract, the defendant may show under a general denial that the contract was a different one from that set out in the petition, or that no contract at all was made. Ency. Pl. & Pr., vol. 1, 818.

* * * * * * * * * * *

BEAN v. LAMPREY.

Supreme Court of Minnesota. 1901.

82 Minnesota, 320.

START, C. J.: The original complaint herein was to the effect that between April and December, 1897, the plaintiff, a physician and surgeon, at the request of the defendant, performed and rendered professional services for the daughter of the defendant, who was a member of his household, of the reasonable value of $387, no part of which has been paid, except the sum of $100. The answer was, so far as here material, in legal effect, a general denial.

* * * * * * * * * * *

It is obvious, from the complaint and the findings, that the defendant's alleged liability was based, not upon any request on his part to the plaintiff for the performance of the services, or any promise, express or implied, made before performance to pay for them, if rendered, but upon the claim that they were rendered "for another, and that the defendant assumed and promised to pay for the same." Hence the plaintiff, unless there was a promise by the defendant, based upon a new consideration personal to him, to pay the claim, was bound to show a promise by the defendant, in writing, to assume and pay the debt, in order to maintain this action. * * *

* * * No action can be maintained on such verbal promises, * * * unless the defendant waived the defense of the statute of frauds, as the trial court held. Whatever may be the rule elsewhere, it is the settled law of this state that the defense of the statute of frauds is not waived, if not pleaded. It is sufficient for the defendant to deny the alleged promise without making any reference to the statute. It is then necessary for the plaintiff to estab-

lish the promise by competent evidence which will satisfy the statute of frauds. But, if the answer admit the alleged promise or agreement, the defendant waives the benefit of the statute, unless he pleads or claims the benefit of it in connection with the admission. *Tatge v. Tatge,* 34 Minn. 274, 25 N. W. 596, 26 N. W. 121; *Fountaine v. Bush,* 40 Minn. 141, 41 N. W. 465; *Iverson v. Cirkel,* 56 Minn. 299, 57 N. W. 800. It follows that the defendant did not waive the statute by not pleading it, and that the plaintiff failed to prove the alleged promise of the defendant to pay the debt by any competent evidence, and that the finding of the court that he did so promise is not supported by any legal evidence, for no claim is made that the promise was in writing.[1]

* * * * * * * * * * *

[1] *Accord:* Miller v. Carolina Monazite Co. (1910), 152 N. C. 608; Thompson v. Frakes (1900), 112 Iowa 585; Kash v. Coleman (1898), 145 Mo. 638; Mitchell v. Henderson (1908), 37 Mont. 515; Christiansen v. Aldrich (1904), 30 Mont. 446; Indiana Trust Co. v. Finitzer (1903), 160 Ind. 647; Bliff v. Bilbe (1903), 68 Neb. 543.

CRANE v. POWELL.

Court of Appeals of New York. 1893.

139 New York, 381.

O'BRIEN, J.: The plaintiff recovered damages for the breach of an agreement, which, on the trial, appeared to be oral. * * * At the trial it appeared that the contract sued upon was not in writing, but the defendant made no objection to oral proof to establish it, and the plaintiff was permitted, without objection, to testify to a verbal agreement to sustain the allegations of the complaint. When the plaintiff rested, however, and again at the close of the case, the defendant moved to dismiss the complaint, on the ground, among others, that as the agreement was not in writing, and as it was not to be performed within one year from the making thereof, it was void by the statute of frauds. The court refused to rule in accordance with this request, and the defendant excepted. * * *

* * * * * * * * * * *

* * * There were, according to some of the cases, two methods in which the defendant could have raised the question that he is now seeking to review, namely, by objection to the proof given, or by specifically pleading the statute of frauds as a defense. But he has omitted to avail himself of either the one or the other. When the statute is set up as a defense, the objection to any other mode of proof than that required by the statute is to be deemed as made in advance, and the defendant may raise the question at any time before the case is submitted to the jury. If the defendant neither pleads the statute nor objects to what may be called the common-law proof of the agreement, it ought to be held, I think, even upon the authority of the earlier cases, that he has waived the objection.

* * * * * * * * * * *

* * * But the important question in the case, and upon which we prefer to let the decision rest, is whether, in the light of the adjudged cases, it is not necessary for a defendant who intends to avail himself of the benefit of the statute, as a defense to an action for damages for breach of a verbal agreement, within the statute, to specifically plead it. It is safe enough to premise that the authorities are not all in harmony on this question, any more than they are upon many other questions with respect to the constitution and application of the statute itself. In England, under the rules framed in pursuance of the Judicature Act, and in some of our sister states, it is necessary to plead the statute. 8 Amer. & Eng. Enc. Law, p. 747, note 2; *Graffam v. Pierce,* 143 Mass. 386; *Lawrence v. Chase,* 54 Me. 196; *Farwell v. Tillson,* 76 Me. 227; *Bird v. Munroe,* 66 Me. 346; *Duck Co. v. Dewey,* 6 Gray, 446.

* * * * * * * * * * *

In *Hamer v. Sidway,* 124 N. Y. 538, the action was against the executors of a deceased person upon a verbal promise to his nephew that he would give him a large sum of money at 21, if, in the mean time, he would abstain from the use of liquor, cigars, billiards, etc. The promise was confirmed by a letter from the uncle after the boy became of age. It was insisted that the promise was within the statute. After stating that the deceased had waived the defense by his letter and statements subsequent to the time of performance, the court, PARKER, J., delivering the opinion, said: "Were it otherwise, the statute could not now be invoked in aid of

the defendant. It does not appear on the face of the complaint that the agreemnt is one prohibited by the statute of frauds, and therefore such defense cannot be made available unless set up in the answer." In *Wells v. Monihan,* 129 N. Y. 161, the action was upon a written promise to pay the debt of another without expressing any consideration, and it was urged upon the argument here that it was void under the statute. Passing upon that point, Judge FINCH said: "So far as the defense in this case rests upon the statute of frauds it must fail, for two reasons: No such defense has been pleaded, and it is not raised by the averments of the complaint; and without one or the other of these conditions the defense, if existing, cannot be made available."

Without referring to the cases in which the precise point does not seem to have been discussed or noticed, sufficient appears to show the tendency of late decisions in this court. They announce a rule well settled and familiar in analogous cases. The statute of frauds is a shield which a party may use or not for his protection, just as he may use the statute of limitations, the statute against usury, that against betting and gaming, and others that might be mentioned. I take it to be a general rule of universal application that the statutes last mentioned are not available to a party unless specifically pleaded, and there is no reason for making the statute of frauds an exception to the rule.

The present system of procedure is founded upon the idea that litigants should, when possible, know in advance the precise questions they must meet at the trial. When a contract is set out in the complaint as the cause of action, and the defendant intends to assail it on some special or statutory ground, the general spirit of the system is not complied with unless notice is given of this intention to the opposing party by the pleadings.[1]

* * * * * * * * * *

[1] *Accord:* Moses Land Scrip & Realty Co. v. Stack-Gibbs Lumber Co. (1910), 56 Wash. 529; Baldwin v. Central Savings Bank (1902), 17 Colo. App. 7; St. Louis, I. M. & S. Ry. Co. v. Hall (1903), 71 Ark. 302; Sanger v. French (1898), 157 N. Y. 213.

GRIFFITH v. WRIGHT.

Supreme Court of Washington. 1899.

21 Washington, 494.

The opinion of the court was delivered by

REAVIS, J.: Respondent (plaintiff) commenced an action to recover judgment on nine promissory notes, executed by appellant, for the sum of $25 each, together with 8 per cent. interest from the date of execution of the notes. The usual allegations were made which entitled respondent to her judgment upon the notes. Appellant answered, admitting the allegations of the complaint, but set up as an affirmative defense, and by way of counterclaim, a note in the sum of $388, executed and delivered by respondent to Mary J. Wright, and the assignment of such promissory note by Mrs. Wright to him before the commencement of the action. Plaintiff replied to the affirmative defense of the answer in the following form: "Plaintiff denies that the note mentioned, described, and set forth * * * was for a valuable consideration, or for any consideration whatever," and also denied the assignment of the note before the commencement of the action. Upon the trial the affirmative was upon the appellant, who proved the assignment, and then rested; whereupon respondent tendered testimony to show a want of consideration of the note set forth in the counterclaim by defendant. Counsel for defendant objected to the testimony offered, on the ground that evidence of such defense—want of consideration—could not be given under the denial set up in the reply; that such defense must be set up as new matter; and that the denial in the reply was a conclusion of law, and raised no issue of fact. The court sustained the objection, and thereupon counsel for plaintiff asked for leave to amend the reply upon the trial, which leave was granted. The reply was amended instanter, and alleged, by way of new matter and defense, "that there was no consideration whatsoever for the making or delivery of the promissory note set forth in said answer and counterclaim." Thereupon the record shows that counsel for defendant addressed the court as follows:

"This reply is defective, just as much as the other was;

doesn't state the facts; pleads a conclusion of law. The only difference between this and the other is that it is alleged as new matter, and not under a general denial. Now, this is as defective as the other in not stating the facts wherein the failure of consideration consists. That is what we want. We want some notion of what their defense is to this note, so that we can frame our answer; so that we can get our evidence in."

The court remarked, "Objection overruled." A question intervened by plaintiff, but before it was answered, counsel for defendant moved to make the amended reply more definite and certain, so that the reply should state in what the consideration failed in the making and delivery of the note, and that the amended reply should allege facts, and not a conclusion of law. This motion was oral, but it was stipulated that it be considered filed. The motion was overruled. Defendant then prayed a continuance on the ground of surprise, and being unprepared to meet the defense at that time. The continuance was refused, and the case proceeded to trial.

The testimony produced at the trial is conflicting, and, in view of the principal error assigned here, it will be unnecessary to refer to it further. The rule with reference to pleading a want of consideration is very well stated in 4 Enc. Pl. & Prac. p. 946: " * * * That, if the contract in suit imports a consideration, * * * the want of consideration cannot be shown under the general denial, but must be pleaded. If, on the other hand, the contract in suit does not import a consideration, thereby making it necessary for the plaintiff to allege a consideration, want of consideration may be shown under the general denial."

And we think, also, that the better rule as to the manner of stating the want of consideration is to state the facts showing the want of consideration. We are aware, however, that the authorities are at variance here, and, while the formula alleging that a promissory note is without consideration is justly subject to the criticism that the statement may be a conclusion of law, yet it may also be construed as an issuable fact where the parties go to trial, and place such construction upon it. *Chamberlain v. Railroad Co.*, 15 Ohio St. 225; Pom. Code Rem. (3d Ed.) § 602; *College v. Bryan*, 50 Iowa, 293.

If defendant is in doubt a motion to make more definite

and certain by pleading the facts which show the want of consideration should be made. The note imported consideration. The want of consideration is, therefore, an affirmative defense, and the facts should be stated sufficiently to apprise the opposite party of them before the trial. It is, however, maintained by counsel for respondent that the first objection to the amended reply made by appellant was in the nature of a general demurrer to the allegation of want of consideration, and therefore the motion was too late. But it seems hardly fair to put such a construction upon the objection. Plaintiff was permitted to amend her reply in the midst of the trial, and the remarks made by counsel for appellant immediately preceding the motion to make more definite and certain should be construed with reference to that motion. We think the motion should have been granted, and that defendant was entitled to it as a matter of right. An inspection of the testimony produced at the trial very fairly illustrates the difficulty under which the defendant was placed in meeting the general allegations of want of consideration for the note. For the error in this regard the cause is reversed, and remanded for a new trial.[1]

GORDON, C. J., and ANDERS, DUNBAR, and FULLERTON, JJ., concur.

[1] *Accord:* Pastene v. Pardini (1902), 135 Cal. 431; Cox v. Sloan (1900), 158 Mo. 411; Sharpless v. Giffen (1896) 47 Neb. 146; Weller v. Colorado Nat. Life Assur. Co. (1911), 49 Colo. 508; Ryan v. Sullivan (1911), 143 N. Y. App. Div. 471.

Failure of Consideration, on the other hand, is new matter, since it admits an originally valid contract which is alleged to have been rendered invalid by reason of the subsequent failure of the consideration. Greer v. Latimer (1896), 47 S. C. 176.

SECTION 3. AFFIRMATIVE DEFENSES.

JACOBY v. JAMES.

Appellate Division of the Supreme Court of New York. 1910.

136 New York Appellate Division, 431.

CLARKE, J.: The demurrer to the second partial defense was properly overruled, and the demurrer to the fourth de-

fense was properly sustained. The answer alleges as follows: "And for a third defense, and in justification of the statements contained in the letter complained of, defendant alleges (6) that the matter complained of, although never published or circulated by this defendant, was and is substantially true." And it then proceeds to set up certain parts thereof as true.

This is pleaded as a complete defense, and the truth is a defense in an action for libel, and justification means a plea of the truth; but the plea of justification is a plea of confession and avoidance, and must admit the publication of the alleged defamatory words. This the defense does not do, but specifically alleges "that the defendant never published or circulated" the alleged libel. The defense is, therefore, bad; and it is also bad because the justification is not as broad as the libel. The demurrer thereto was, therefore, improperly overruled.[1]

* * * * * * * * * *

[1] *Accord:* State ex rel. v. Delmar Jockey Club (1906), 200 Mo. 34, 66.

Denials incorporated into Affirmative Defenses. On this subject the Appellate Division of the Supreme Court of New York said, in Haffen v. The Tribune Association (1908), 126 N. Y. App. Div. 675: "A denial, either general or specific, is not the statement of any new matter and as such is improperly included in an affirmative defense, unless it be necessary to make such new matter complete in order to constitute a defense, inasmuch as it is not a confession or avoidance of the matters alleged in the complaint. A general denial in an affirmative defense is always improper. A specific denial may or may not be, depending upon the new matter pleaded. Each separate defense pleaded must be complete in itself and contain all that is necessary to answer the whole cause of action, or that part of it which it purports to answer. If the new matter pleaded is not complete without a specific denial, then it may be properly included. When an affirmative defense contains a general denial, its validity cannot be tested by demurrer. A specific denial cannot, however, be included in an affirmative defense unless it is necessary to make the defense complete and available, and if improperly included may be stricken out on motion." To the same effect see Wiener v. Boehm (1908), 126 N. Y. App. Div. 703.

CINCINNATI TRACTION COMPANY v. FORREST.

Supreme Court of Ohio. 1905.

73 Ohio State, 1.

SPEAR, J.: In her petition the plaintiff, as cause of action, alleged that she was a passenger on a street car on the track of the company's line in Cincinnati; that desiring

to alight at the corner of Findlay and Vine streets she signalled the conductor to stop at that point; that, in response to said signal, thereupon the car did stop at that point; that she started to alight from the car, when, just as she was about to step from the running board on to the ground, the conductor negligently, and before she was able to alight from the car, signaled the car to go on, and thereupon the motorman started the car, all before plaintiff was able to alight from the same to the ground and while she was in the act of so alighting; and thereupon the car so suddenly starting threw plaintiff to the ground before she was able to alight from the same, all without fault and negligence upon her part, and wholly by reason of the negligence of the conductor and motorman, who were in charge of the operation of the car and operating the same for the defendant company; she was violently thrown upon the ground and badly injured and bruised; that her left arm was broken, and that she suffered great pain and injury therefrom, and loss of time. The answer of the company admitted the allegation that it is a corporation organized under the laws of Ohio, and, excepting this, denied each and every allegation in the petition contained.

* * * * * * * * * * *

The issue thus made was a simple one. Did the accident happen by reason of the negligent starting of the car while the plaintiff was in the act of alighting from it? If it did, then she was entitled to recover. If it did not, she was not. It is true that the petition contained an averment that the accident occurred without fault or negligence on the part of the plaintiff and that this was denied by a general denial, but such denial was not the equivalent of an allegation of contributory negligence, because the entire incident itself as pleaded was denied. The element of contributory negligence could not, in the nature of things, become a feature of an event which did not occur at all. From this it follows that there was no issue in the pleadings respecting contributory negligence. * * *

Contributory negligence on the part of a plaintiff implies negligence on the part of the other party. It cannot exist without it. It is the want of ordinary care by a person injured by the negligence of another, concurring with such negligence and thus contributing to the injury as a proximate cause. See 7 Am. & Eng. Ency. Law, 371; *Montgom-*

ery Gaslight Co. v. Railway Co. 86 Ala. 372; *Moakler v. Willamette Railway Co.*, 18 Or. 189; *Southern Bell Tel. Co. v. Watts,* 66 Fed. 460. The plaintiff's negligence may be the sole proximate cause of the injury, but it is not in such case contributory negligence, because to contribute is to have a share in some act or effect, to lend assistance, or aid. Hence, if no act occurs to be aided, there can be no act which is contributory.

* * * * * * * * * *

RAMP v. METROPOLITAN STREET RAILWAY COMPANY.

Kansas City Court of Appeals. 1908.

133 Missouri Appeal, 700.

JOHNSON, J.: Plaintiff, in attempting to alight from a cable street car on which she was a passenger, fell to the pavement, and was injured. She brought suit against defendant, the carrier, for the damages sustained, on the ground that her fall was caused by its negligence. * * * * * * The answer of defendant is as follows: "Now comes defendant, and for answer to the amended petition of plaintiff filed herein denies each and every allegation in said petition contained. And, for further answer, defendant says that, if plaintiff received any injuries at the time mentioned in said petition, the same were caused by plaintiff's own fault and negligence."

* * * * * * * * * * *

Contributory negligence is a plea in the nature of a plea of confession and avoidance. It carries the idea that a cause of action would exist in favor of the plaintiff but for the fact that negligence of the plaintiff co-operated with that of defendant to produce the injury. Necessarily it is an affirmative defense, and the burden is on the defendant to plead and prove it, if he would receive its benefits. An exception to this rule applies to cases where the evidence introduced by the plaintiff shows that his own negligence co-operated with the negligence of defendant to cause the injury. In such instances, defendant is entitled to receive the benefit of

the defense, regardless of whether or not it is pleaded in the answer, but in all other cases the defense is waived if not pleaded. *Allen v. Transit Co.*, 183 Mo. 411; *Kaminski v. Iron Works*, 167 Mo. 462.

Turning to the answer of defendant, we find it does not contain this plea. The averment that "if plaintiff received any injuries, * * * the same were caused by plaintiff's own fault and negligence," is the statement that negligence of plaintiff was the sole cause of her injury, and is not equivalent to an allegation that such negligence contributed with negligence of defendant to the production of the injury. The defense it attempted to raise was one defendant had the right to offer, under a general traverse, since it in no sense partook of the nature of a plea of confession and avoidance, but directly negatived the very existence of the cause of action. *Allen v. Transit Co., supra.* Its incorporation in the answer was wholly unnecessary and purposeless, and should be treated as so much surplusage.[1]
* * *

[1] *Accord:* Cogdell v. Wilmington & Weldon Rd Co. (1903), 132 N. C. 852.

LIBBY v. ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

St. Louis Court of Appeals. 1909.

137 Missouri Appeal, 276.

NORTONI, J.: This is a suit for damages alleged to have accrued to the plaintiffs because of the defendant's breach of duty in respect of its obligation as a common carrier. At the conclusion of all the evidence, the court directed a verdict for the defendant, and plaintiffs prosecute the appeal.

* * * * * * * * * * *

The record discloses that there was a special contract between the parties with respect to the shipment in question. * * * One of the provisions of the special contract is to the effect that, as a condition precedent to any damages

for loss or injury to live stock, the shipper will give notice in writing of the claim therefor to some agent of the carrier, etc., within a time therein limited. It does not appear in the record whether any such notice was given, nor does it appear that it was not given. There is nothing tending to show a waiver of the stipulation referred to. In fact, the evidence is entirely silent as to whether this provision of the contract was complied with, or whether it was waived. The judgment of the trial court in directing a verdict is sought to be sustained here upon this stipulation contained in the shipping contract. * * * The question as to whether or not it devolves upon the plaintiffs to prove the notice had been given or waived, as a condition precedent to their right of recovery, is to be determined by reference to the nature of the action. It is true the authorities usually speak of such stipulations as conditions precedent, and it is no doubt true, when the suit is on the special contract, the burden is on the plaintiffs to show that the notice required was either given or waived. This is in keeping with the rule of law generally on such questions, to the effect that one declaring upon a contract must show full performance of its conditions on his part. However this may be, when the action is in tort, as here, plaintiffs made out their case by showing the shipment in good condition, unreasonable and negligent delay, and the negligent injury to the stock and decline of the market. In an action ex delicto, such as this one, plaintiff is not required to introduce the bill of lading, but may and must prove a breach of the carrier's obligation imposed by law. Therefore he is not required to prove either that he gave the notice mentioned, or that it was waived. * * *

* * * * * * * * * * *

We have considered the contract thus far for the reason that the judgment of the trial court is sought to be sustained thereon. However, we are of the opinion that this contract was not properly in the case, for the reason it was not invoked in the answer. As stated before, the answer was merely a general denial. This being true, the contract was erroneously admitted in evidence over the objection and exception of plaintiffs' counsel. Our statute (section 604, Rev. St. 1899 [Ann. St. 1906, p. 631]) authorizes a general or specific denial of the material allegations of the petition, and requires, second, the statement of any new matter constituting a defense thereto. There can be no doubt that the

stipulation of the contract respecting notice introduced new matter into the case which should have been pleaded in the answer. Under the general denial, the defendant can show such facts only as disprove the facts alleged in the petition. If the defendant relies upon matters in confession and avoidance of the action, they should be brought forward by a competent plea in the answer. 3 Ency. Pl. & Pr. 858. If the defendant rests its defense upon any fact which is not included in the allegations necessary to support plaintiffs' case, it must set out such facts in its answer, according to the statute, in plain and concise language; otherwise it will be precluded from giving evidence of it at the trial. *Northrup v. Miss. Valley Ins. Co.*, 47 Mo. 435, 4 Am. Rep. 337; *State ex rel. Demuth v. Williams*, 48 Mo. 210; *Nelson v. Wallace*, 48 Mo. App. 193; 3 Enc. Pl. & Pr. 558. In keeping with the doctrine of the code last referred to, it has been frequently declared that noncompliance with the stipulation of a shipping contract requiring notice, as in this case, is a matter of defense to be affirmatively pleaded in the answer. *Hatch v. Railway Co.*, 15 N. D. 490; *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300; *Central Vermont, etc., Ry. Co. v. Soper*, 59 Fed. 879. See, also, *The Westminster*, 127 Fed. 680; 3 Hutchinson on Carriers (3d Ed.) §§ 1345, 1332. The defendant not having invoked in its answer the stipulation of the special contract touching the matter of notice, it was not competent to consider it in evidence over plaintiffs' objection and exception. The mere fact the action sounds in tort does not render the special contract incompetent as a defense. If properly pleaded, it is entirely competent to be considered for what it is worth. *Oxley v. St. L., K. C. & N. Ry. Co.*, 65 Mo. 629.

For the reason the special contract is not properly in the case, its validity, and such other provisions as are sought to be invoked, will not be further noticed.

The judgment will be reversed, and the cause remanded.

It is so ordered.

REYNOLDS, P. J., and GOODE, J., concur.

STATE SAVINGS BANK v. ALBERTSON

Supreme Court of Montana. 1909.

39 Montana, 414.

MR. Chief Justice BRANTLY delivered the opinion of the court.

Appeal from a judgment in favor of plaintiff and for an order denying defendants' motion for a new trial. The complaint contains two counts. The first alleges that Fred. M. Ferrell, John J. Ferrell, Henry Albertson, and George Kendall were between December 24, 1900, and May 27, 1901, copartners doing business under the firm names of the Fred. M. Ferrell Company and the John J. Ferrell Brokerage Company; that on January 2, 1901, they caused to be executed and delivered to the plaintiff a promissory note for the sum of $4,000, signed "Fred. Ferrell Co.," and "John J. Ferrell Brokerage Co.," the payment of which was guaranteed by indorsement by Fred. M. Ferrell and John J. Ferrell; and that there is due and unpaid thereon the whole of the principal sum, with interest at the rate of 10 per cent. per annum, as stipulated therein, since April 4, 1902. In the second count the same allegations are made as to the copartnerships of the defendants, and it is then alleged that the plaintiff between the dates named loaned and advanced to, and for the use of, the copartnerships, on account of overdrafts, moneys to the amount of $12,240.34, no part of which has been paid, except the sum of $5,956.35, leaving a balance due and unpaid of $6,283.99, with interest at 8 per cent. per annum, the stipulated rate, since May 24, 1901. Judgment is demanded for the amount of these balances, with interest.

* * * * * * * * * * *

3. It is said that the court erred in refusing to admit evidence tending to show that at the time the plaintiff made the loans to the defendants it knew that they were engaged in carrying on an illegal business, to-wit, gambling, by making purchases and sales of mining stocks for their customers exclusively on margins. It may be assumed for present purposes that the business conducted by the defendants was of such a character as to render the copartnership

contracts void, and also all contracts made by the copartnerships with third persons having direct reference to, and in furtherance of, them. It may be further assumed that the plaintiff made the loans for the express purpose of being used in the illegal business, and that the evidence offered would have established the fact beyond question. Yet there was no issue on the subject in the pleadings. Hence the evidence was not relevant. The complaint on its face does not show that the purpose for which the loans were made was illegal; nor was it necessary for the plaintiff to go further into the subject of consideration in offering its proof in order to make out a case upon which it could recover than to show a loan to the copartnerships. It was then incumbent upon the defendants, in order to avoid the prima facie case thus made, to show the illegal purpose of the contract, if they could, and to this end it was incumbent upon them to present the facts in their pleading by way of special defense in the nature of a plea of confession and avoidance. Bliss on Code Pleadings, § 330; Pomeroy's Remedies (4th Ed.) § 584; Bates' Pleadings & Practice, P. & F., 1292.

* * * * * * * * * * *

The judgment and order are affirmed.

Affirmed.[1]

SMITH and HOLLOWAY, JJ., concur.

[1] In holding that illegality was new matter, the Supreme Court of Minnesota, in Dodge v. McMahan (1895), 61 Minn. 175, said:—"Authorities may be found, even in some of the code states, to the effect that, under a mere denial, evidence of any fact may be given in evidence that would go to the original validity of the contract sued on,—that is, which, although admitting the making of the contract, would show that, when made, it was for some reason invalid; as, for example, that it was made on Sunday, or that it was a gambling or wagering contract. But this rule is not in accordance with either the spirit of the reformed procedure or the decisions of this court. The correct rule is that, under a denial, the defendant is at liberty to give only such evidence as tends to disprove the existence of the facts, as facts, alleged by the plaintiff, but not of any matter aliunde, which, although admitting such facts, would tend to avoid their legal effect and operation."

PENN MUTUAL LIFE INSURANCE COMPANY v. ORNAUER.

Supreme Court of Colorado. 1907.

39 Colorado, 498.

CAMPBELL, J.: Action to recover commissions which plaintiff claims are due him under a written contract which he made with defendant company. From a judgment for plaintiff, defendant has appealed.

* * * * * * * * * * *

2. The defendant offered to show nonperformance by plaintiff of certain conditions with which he was required to comply under his contract, and upon plaintiff's objection the offer was refused. Defendant contends that plaintiff is entitled to certain commissions only in the event of his resignation, without having violated any of the conditions of the contract or rules of the company, and as he did not resign, but was discharged for violating them, he cannot recover. Evidence offered by defendant under the general denial to prove plaintiff's remissness and discharge therefor was not admitted. The position of the defendant is that, under the general denial contained in the answer, this evidence was admissible, while plaintiff says, if defendant wanted to rely upon such nonperformance, it should have specially, by way of an affirmative defense, alleged the existence of such conditions, and their breach.

It is unquestionably true that, under a general denial, a defendant may introduce any evidence which controverts the facts which plaintiff is bound to establish in order to sustain his action. Under this doctrine, the defendant contends that, under its general denial, it may show that what it calls conditions *precedent* had not been fulfilled. In this complaint there was an averment generally, permitted by section 56 of our code, that plaintiff had fully performed all conditions of the contract to be by him performed. Where such an averment of performance of conditions precedent is allowed in the complaint, the rule is that, if a defendant relies upon nonperformance, he must specially allege the condition or conditions on the nonperformance of which he

relies, and negative their performance. Bliss on Code Pleading (3d Ed.) § 356a; Nash on Pleading, 300, 302, 782.

Our Court of Appeals in *Insurance Co. v. Allis Co.,* 11 Colo. App. 264, has held that, where a good cause of action upon a contract appears on the face of the complaint, if the defendant intends to rely upon a breach of any condition, the condition and the facts constituting its breach should be set forth in the answer. In *Mut. Ben. Ass'n v. Nancarrow,* 18 Colo. App. 274, that doctrine was again announced. To the same effect are *Kahnweiler v. Phoenix Ins. Co.,* 67 Fed. 483, and *Schneider Brewing Co. v. Amer. Ice-Mach. Co.,* 23 C. C. A. 89, 77 Fed. 138. In the former case the Kansas code provisions the same as ours, and in the latter case our own sections, were construed, and in an elaborate opinion by CALDWELL, J., it was held that, when a defendant relies upon a condition precedent in a contract as an excuse for not performing the contract on his part, he must set out specifically the condition and its breach. Whether the conditions are precedent or subsequent is not argued by counsel, though it would seem they are subsequent, and, if so, and noncompliance therewith is relied on, they must be alleged and their breach stated. 8 Cyc. 558, 559. But there was no error in refusing evidence offered by the defendant tending to show their breach, whatever their character, because of the omission from the answer of the appropriate allegations. In addition to the foregoing authorities, see 9 Cyc. 723, and cases cited, and 4 Enc. Pl. and Pr. 663.

* * * * * * * * * *

The judgment is affirmed.

Affirmed.[1]

Chief Justice STEELE and Mr. Justice GABBERT concur.

[1] Judge Caldwell, in the case referred to, quoted Preston v. Roberts, 12 Bush (Ky.) 570, 583, as stating the same rule, and showed that it was in harmony with the English practice, citing Glenn v. Leith, 22 Eng. Law & Eq. 489; Graves v. Legg, 25 Eng. Law & Eq. 552.

COLUMBIA NATIONAL BANK v. WESTERN IRON AND STEEL COMPANY.

Supreme Court of Washington. 1896.

14 Washington, 162.

DUNBAR, J.: The first count of the complaint alleged simply that the plaintiff was a national banking association, and that the defendant was a domestic corporation. The second count alleged the execution of the note in controversy, by the defendant; and the third, that no part of the same had been paid, and that the same was wholly due. The allegations of the direct answer were as follows: "(1) Defendant admits the allegations of paragraphs one and two thereof; (2) defendant denies each and every allegation in paragraph three thereof contained." And the answer then set up an alleged affirmative defense. The plaintiff denied each and every allegation of the affirmative answer, and moved for judgment upon the pleadings, which motion was sustained by the court; and judgment was rendered for the amount claimed in the complaint, after the taking of proof by the court of the amount due by defendant to plaintiff.

It is contended by the appellant (defendant below) that the court erred in sustaining respondent's motion for judgment on the pleadings; that the issue of payment of the note was squarely effected by the denial in appellant's answer to the third paragraph of plaintiff's complaint. We do not think this contention can be sustained, under the law. In *Edson v. Dillaye,* 8 How. Prac. 273, the complaint alleged the nonpayment of the note. The answer admitted the making of the note, but denied the allegation of nonpayment of the said note as set forth in said complaint, and also denied that defendants were indebted to said plaintiff for said note, or by reason of the making thereof, or that said note, or any part thereof, was justly due or owing by them. Held, "that all the allegations of the answer, after the admission of making the note, should be stricken out as frivolous." The court, in that case, construing a statute substantially like ours, said:

"Under these denials, no new matter would be admissible in evidence. The plaintiff would have nothing to

prove upon the trial, except it might be a computation of the interest upon the note, for the making of the note is admitted by the answer. He would only have to open his case to the jury, and demand their verdict, and there is nothing that the defendants could give in evidence under their answer. They could not prove payment, because they have not set it up in their answer; and so of any other imaginable defense. Having admitted the making of the note, and not having set up any fact showing why they ought not to pay it, their liability to pay it is a legal conclusion, from which the defendants cannot escape, as they have not prepared the way, by their answer, for giving any defense in evidence."

Bliss on Code Pleading (section 357) lays down the rule that nonpayment is an affirmative matter, and must be pleaded as well as proved. See, also, *Bethel v. Robinson,* 4 Wash. 446, 30 Pac. 734; Van Santv. Pl. § 470; *Houghton v. Townsend,* 8 How. Prac. 441; *Clark v. Spencer,* 14 Kan. 398.

In *Hubler v. Pullen,* 9 Ind. 273, the court said:

"The complaint, it is true, ordinarily avers that the instrument sued on has not been paid; still, proof of that averment is not required, and therefore it is not put in issue by a general denial."

* * * * * * * * * * *

The judgment of the court will be affirmed.[1]

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

[1] This is the almost universal rule: Welles v. Colorado Nat. Life Assur. Co. (1911), 49 Colo. 508; Montgomery v. Leniver (1905), 94 Minn. 133; Heber v. Estate of Heber (1909), 139 Wis. 472; Farmers' Nat. Bank v. Hunter (1899), 35 Ore. 188; Cady v. South Omaha Nat. Bank (1896), 46 Neb. 756; Ferguson v. Dalton (1900) 158 Mo. 323; Marshall & Iseley Bank v. Child (1899), 76 Minn. 173; Hopper v. Hopper (1901), 61 S. C. 124; Lokken v. Miller (1900), 9 N. D. 512; Meating v. Tigerton Co. (1902), 113 Wis. 379; Morehouse v. Throckmorton (1899), 72 Conn. 449; Hartzell v. McClurg (1898), 54 Neb. 313; Pastene v. Pardini (1902), 135 Cal. 431 (the case of Bank of Shasta v. Boyd (1893), 99 Cal. 604, holding *contra,* seems to have been a mere inadvertence.)

In Melone v. Ruffino (1900), 129 Cal. 514, the court said: "Of course, it has been held by this court, as it was always held at common law, that in a complaint upon promissory note, or other obligation to pay money, there must be an averment that the money has not been paid. This is necessary to make the complaint perfect upon its face. But it is a *non sequitur* to say that because such negative averment is necessary in the complaint therefore it is necessary for the plaintiff to prove it. * * * The general rule is that a party is not called upon to prove his negative averments, although they may be necessary in his pleading. * * * A negative allegation is to be proved only when it constitutes a part of the original substantive cause of action upon which the plaintiff relies, and this is an exception to the gen-

eral rule. As, for example, in an action for malicious prosecution the plaintiff must both allege and prove want of probable cause, for the latter, although in the nature of a negative averment, is a necessary ingredient in the cause of action itself, and another instance is where the cause of action consists in the failure of the defendant to do certain work in a workmanlike manner; that the very gist of the cause of action is the allegation that the work, although done, was not done in the proper manner.''

On the other hand, the Supreme Court of Montana refuses to subscribe to such doctrine in a vigorous opinion in Yancey v. Northern Pac. Ry. Co. (1910), 42 Mont. 342. The court says: ''We adopt the following from 16 Encyclopedia of Pleading and Practice, 178: 'Whatever, in general it is necessary for a plaintiff to prove to make out his cause of action, it is necessary for him to allege in his complaint, and whatever facts it is necessary for a plaintiff to allege it ''follows as a logical consequence'' must be proved.' So manifestly just and sensible is this rule, that one is surprised to find that it is not universally recognized and applied. While many courts refuse to follow it, we insist that any other rule leads to the most absurd results. * * * If the allegation of nonpayment is necessary in an action upon an express contract, it is equally necessary upon an implied contract. Our conclusion is that the allegation of nonpayment in this counter claim is a material allegation—one necessary to state a cause of action—and, being deemed denied, must be proved; and the defendant, having the affirmative of that issue, had the burden of proof. * * * Since the defendant failed to prove non-payment, it failed to establish its counterclaim, and the verdict returned was fully justified.'' Cited with approval in First Nat. Bank v. Silver (1912), 45 Mont. 231.

If non-payment is not alleged in the complaint a demurrer will lie: Hurley v. Ryan (1897), 119 Cal. 71.

VALLENCEY v. HUNT.

Supreme Court of North Dakota. 1910.

20 North Dakota, 579.

CARMODY, J.: Action to recover the possession of personal property consisting of a threshing machine and traction engine. Plaintiff bases his right to recover the possession of such property under a chattel mortgage dated September 3, 1901, and given to secure the payment of a promissory note for the sum of $645 executed and delivered by defendant to one James O'Loughlin on said date and transferred to plaintiff prior to the commencement of the action. The complaint alleges the execution and delivery of said note and mortgage by defendant to O'Loughlin, and the assignment thereof by the latter to the plaintiff as aforesaid. It also alleges nonpayment of the note, a demand for the possession of the property, and that defendants wrongfully refused to surrender possession

thereof to the plaintiff. The prayer is in the usual form. The answer is a general denial merely.

* * * * * * * * * * *

* * * The sale having become an executed contract it follows that plaintiff, as the assignee of the note and chattel mortgage which are past due and unpaid, has a special property in such separator and engine, and is entitled to the possession thereof for the purpose of foreclosing the chattel mortgage, unless defendants have established a legal defense thereto, and this brings us to the question whether, under the general denial in the answer, it was error to permit defendants to prove a warranty, a breach thereof, and damages resulting from such breach. We are entirely clear on principle and authority that such evidence was wholly inadmissible. Manifestly, such defense consisted of new matter and must be specially pleaded. It was in the nature of a set-off or counterclaim. It did not directly tend, in the least, to deny or refute any of the allegations of the complaint. The authorities are practically unanimous to the effect that such a defense cannot be proved under a general denial.

In 31 Cyc. 697, it is said: "A counterclaim or set-off must under code procedure always be specially pleaded"—citing many authorities from code states, including *Hogen v. Klabo,* 13 N. D. 319, 100 N. W. 847. In 34 Cyc. 1417, the correct rule regarding the right of a defendant in a replevin action to interpose a set-off or counterclaim, is stated as follows: "Since the adoption of codes in most of the states, the doctrine of set-off and counterclaim has undergone much change. At first, counterclaims were held not to be available in any action for a tort, and therefore not in replevin, which sounds in tort. But this rule has been so far modified as to allow the interposition of a counterclaim in the full sense of the code, whether arising on contract or based upon a tort, in an action of replevin, whenever such counterclaim is founded upon a cause of action arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim, or whenever it is connected with the subject of the action." In the note at the bottom of the page is the following: "In replevin by a mortgagee to recover possession of the mortgaged property, which was sold to defendant, and the mortgage given to secure the purchase price thereof, de-

fendant may counterclaim damages arising from a breach of warranty of the goods sold. *McCormick Harvesting Machine Co. v. Hill*, 104 Mo. App. 544, 79 S. W. 745; *Wilson v. Hughes*, 94 N. C. 182; *Minneapolis Threshing Machine Co. v. Darnall*, 13 S. D. 279, 83 N. W. 266; *Aultman v. McDonough*, 110 Wis. 263, 85 N. W. 980." Many authorities are therein collated holding that in an action of replevin defendant may plead matters by way of set-off and counterclaim. Why such holding, if, as here contended, all such matters may be proven under a mere general denial? Expressions may be found in many cases to the effect that under a general denial defendant may prove any defense tending to refute any of the material allegations in the complaint, but it will be found that almost invariably where such expressions were used the courts were dealing with defenses in the strict technical meaning of the word, as for instance in *Dewey v. Robbitt*, 79 Kan. 505, 100 Pac. 77, where the defense was failure of consideration; or, as in *Payne v. McCormick Harvesting Machine Co.*, 11 Okl. 318, 66 Pac. 287, where the defense was fraud and deception in obtaining the mortgage under which plaintiff sought to recover the property, or, as in *Wylie v. Marinofsky*, 201 Mass. 583, 88 N. E. 448, where the defense was that the plaintiff through his agent had sold the property to defendant. In the latter case, which was an action of replevin to recover a horse, among other things it was said: "The plaintiff, in order to prevail, must establish by a preponderance of the creditable evidence that he is at least entitled to the possession of the property in question. * * * The burden of proving this proposition rests on him throughout the trial. In the present case the answer of the defendant, which was a general denial, rendered competent any evidence which tended to controvert this contention of the plaintiff. * * * The plaintiff asserted ownership as the foundation of her right to possession. She assumed, therefore, the burden of proving title in herself. This burden did not shift. Indeed, the burden of proof does not shift under the law of this commonwealth. * * * When the plaintiff has closed his case the defendant may then attack it. If he merely introduced evidence which breaks down the case of the plaintiff, he assumes no burden of proof. In a replevin case he may attempt to show that the plaintiff never had

title or has disposed of his title. But this is still merely an attack upon the plaintiff's case, namely, his right to immediate possession of the property. * * * He does not thereby raise a new technical issue. His evidence directed to these points is all admissible under a general denial, and does not require specification in the answer. * * * The defendant undertook to do more in this case. He did not defend on any ground of confession and avoidance. He asserted facts directly at variance with those proffered by the plaintiff. It was analogous to the familiar defense in actions of contract that a different contract from that claimed by the plaintiff was in fact made, which is provable under a general denial, and as to which the burden is not on the defendant but continues on the plaintiff. *Starrett v. Mullen,* 148 Mass. 570, 20 N. E. 178, 2 L. R. A. 697; *Phipps v. Mahon,* 141 Mass. 471, 5 N. E. 835. If the defendant sets up any independent defense outside the issue raised by the pleadings of the plaintiff, then he assumes the burden of proving that distinct and independent allegation. *Sayles v. Quinn,* 196 Mass. 492, 82 N. E. 713; *Powers v. Russell,* 13 Pick, (Mass.) 69. But the evidence by the defendant in the present case that the plaintiff's agent, either by original authority or subsequent ratification and adoption, had sold the horse to him, went to the root of the plaintiff's claim, which it was fundamentally necessary for her to establish, that she was the owner and entitled to possession."

In *Aultman Company v. McDonough,* 110 Wis. 85 N. W. 980, the facts were quite analogous to those in the case at bar, but the defendant specially alleged, by way of counterclaim, the matters which defendants were permitted in the case at bar to prove under the general denial. We quote from the opinion: "As indicated in the statement, the plaintiff, as mortgagee, brought this action of replevin by reason of the defendant's default in payment of a part of the purchase price of the machinery covered by the mortgage. The right to maintain such an action is undisputed. *Gage v. Wayland,* 67 Wis. 566, 31 N. W. 108; *Rice v. Kahn,* 70 Wis. 323, 35 N. W. 465; *Hill v. Merriman,* 72 Wis. 483, 40 N. W. 399. Of course, the plaintiff's special interest in the property is limited by the amount of the mortgage debt. *Gage v. Allen,* 84 Wis. 323, 54 N. W. 627. The defendant, by way of counterclaim, sought to extin-

guish or reduce such special interest by alleging damages for the breach of warranty on his purchase of the engine covered by the mortgage, and also damages for loss of time and expenses in trying to operate the engine returned to the plaintiff, and for which the engine covered by the mortgage was, in part, taken in exchange. Such counterclaim arose out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, and is connected with the subject of the action, within the meaning of the statute, especially as the plaintiff is a nonresident. Subdivisions 1, 3, § 2656, St. 1898."

It is true the court nowhere says that such defenses might not have been proven under a general denial but if such is the court's understanding it seems queer that they should waste time in giving reasons why such counterclaim was properly interposed. A very clear statement of what defenses are admissible under a denial and what are new matter and must be specially pleaded may be found in Pom. Code Rem. (3d Ed.) § 673. See, also, Id. § 686 et seq. Prof. Pomeroy, among other things, says: "All facts which directly tend to disprove any one or more of these averments may be offered under the general denial; all facts which do not thus directly tend to disprove some one or more of these averments, but tend to establish a defense independently of them, cannot be offered under the denial. They are new matter, and must be specially pleaded." Section 673.

If respondents' contention be sound that they could prove these damages without alleging them by way of a set-off or counterclaim, then it would inevitably and logically follow that in claim and delivery actions every conceivable defense whether consisting of new matter or not may be proved under a general denial, and that consequently set-offs and counterclaims are total strangers to an answer in such cases. Such a doctrine is contrary both to the letter and spirit of all rules of pleading. The books are full of cases in which set-offs and counterclaims have been upheld in actions of this nature, but they were specially pleaded in all except a very few which we will here notice.

The Appellate Court of Indiana in *Aultman & Co. v. Forgey et al.*, 10 Ind. App. 397, 36 N. E. 939, seems to have squarely held that a breach of warranty constitutes mat-

ter of defense, and is available under a general denial without an affirmative plea. The opinion is clearly unsound and is not supported by any of the authorities therein cited and relied on.

* * * * * * * * * * *

The case of *Plano Mfg. Co. v. Daly*, 6 N. D. 330, 70 N. W. 277, is strictly in line with our views above expressed. It was there merely held that, under a denial, fraud or mistake in the execution of the mortgage, under which plaintiff based his title and right to possession, could be proved. Of course such matters were strictly defensive as they directly tended to break down plaintiff's alleged title and right to possession.

* * * * * * * * * * *

The judgment is reversed, and the district court is directed to enter a judgment in favor of plaintiff as prayed for in his said motion. All concur, except MORGAN, C. J., who dissents.

THOMPSON v. HALBERT.

Court of Appeals of New York. 1888.

109 New York, 329.

FINCH, J.: This action was brought to recover damages for the conversion by the defendants of two notes, and the mortgages which secured them. The first cause of action pleaded, respects a note and mortgage upon land in Kansas, dated in 1871; and, as an answer to that, the defendants alleged in their seventh defense that by the laws of that state, in which the maker of the note resided and the land was located, the note and mortgage were barred by the statute of limitations, and that no action could now be maintained thereon. To this answer the plaintiff demurred, on the ground that it was insufficient in law on the face thereof. The demurrer was sustained by the special term, but that decision was reversed by the general term on appeal.

We are of opinion that the reversal was erroneous. The

facts stated in the answer were not pleaded as a partial defense or in mitigation of damages. Where that is attempted, the code explicitly requires that the answer shall so state, and give notice that the facts relied upon are intended as a partial defense. Section 508. When no such statement is made, the plaintiff has the right to assume, and the court must assume, that the new matter alleged is pleaded as a complete defense, and, if demurred to, must be tested as such. *Matthews v. Beach,* 5 Sandf. 256, 8 N. Y. 173. Applying that test, the answer is insufficient. It merely affects the amount of damages to be recovered, by tending to reduce the value of the securities converted. It confesses, but does not avoid. It admits the cause of action, and questions only its extent and amount, and is not a bar to a recovery. It is bad, therefore, as a defense, and the special term was right in so holding. It is not denied that the facts alleged, if admissible at all, may nevertheless be put in evidence for the purpose of affecting or reducing the value of securities. *Booth v. Powers,* 56 N. Y. 22. So far as the question of pleading is concerned, they are admissible under the denials of the answer. The plaintiff must prove the value of the articles converted as the basis of his recovery, and what he may prove the defendants, denying, may disprove. The plaintiff averred the value of the note to be $300, and the accrued interest at 12 per cent. The defendants deny that allegation, and aver that the same had no value, and also deny the alleged conversion. While the allegations of value and no value may perhaps not make a technical issue, because needless, yet, under the denial of the answer, which puts in issue plaintiff's whole cause of action, the defendants have a right to prove any facts which affect the value of the securities, and possibly to an amount which would reduce the recovery to merely nominal damages; and so, as a question of pleading, and although the seventh defense be stricken out, may prove the law of Kansas, and show the difficulty and uncertainty of collection. *Knapp v. Roche,* 94 N. Y. 333. So much the plaintiff concedes. Precisely what useful purpose was served by interposing this demurrer it is therefore difficult to see; but the question is raised, and must be correctly decided.

The argument of the general term appears to be that the facts pleaded might induce the jury to find that the

securities converted were absolutely valueless, and so the defense becomes a complete one. It would be more correct to say that the damages would become merely nominal, although the conversion would remain, and the wrong itself be undefended. An answer does not bar a cause of action, and so constitute a defense, when it affects merely the measure of damages.

The judgment of the general term should be reversed, and that of the special term affirmed, with costs, but with leave to the defendants, upon payment of the costs of the demurrer, to plead anew or amend within 20 days after entry and notice of this judgment.[1]

All concur.

[1] *Accord:* Breyfogle v. Stotsenburg (1897) 148 Ind. 552; Peck v. Parchen (1879), 52 Iowa 46; Fitzsimmons v. City Fire Ins. Co. (1864), 18 Wis. 234; McDaniel v. Pressler (1892), 3 Wash. 636; Webb v. Nickerson (1884), 11 Ore. 382.

SECTION 4. INCONSISTENT DEFENSES.

BANTA v. SILLER.

Supreme Court of California. 1898.

121 California, 414.

The COURT: The verdict and judgment were for plaintiff. Defendants appeal from the judgment and from an order denying their motion for a new trial.

* * * * * * * * * * *

The respondent, while riding a bicycle came into contact with a horse and wagon belonging to the appellants, and was injured thereby; and this suit is brought to recover damages for the alleged injury. In their answer, the appellants, in addition to denials, set up two separate and distinct defenses, to wit: (1) That at the time of the collision the horse and wagon were not under the control of the appellants, or either of them, and were not being driven by any of defendants' servants, but were in the possession and control of one Axel Telstrom, to whom they had furnished the same for the purpose of carrying out a certain independent contract made by said Telstrom;

and (2) that the horse and wagon were at the time owned by appellants, and were being driven by them along the highway, and that the accident occurred through the negligence, etc., of the respondent, and not through any fault of defendants, or any of their servants or employes. The complaint and answer were both verified. The court tried the case upon the theory that, where an answer is verified, there cannot be set up in it two inconsistent and contradictory averments. This point arose upon the refusal of the court to stop counsel for respondent, in his argument to the jury, from contending that appellants had committed perjury in their answer; upon an instruction to the jury that Telstrom must be held to have been the servant of the appellants; and upon an instruction that "a defendant may plead as many separate defenses as he has, but a sworn answer must not deny a fact in one part which is averred to be true in another part." In these rulings the court erred; and, for the errors thus committed, the judgment must be reversed, and a new trial ordered. There is some language in the opinion of the court in the case of *Bell v. Brown,* 22 Cal. 678, which, if considered by itself, and disconnected from the rest of the opinion and from the facts in the case, gives some support to the views of the court below on this point.

Section 441 of the Code of Civil Procedure provides that "the defendant may set forth, by answer, as many defenses and counter-claims as he may have," and that "they must be separately stated"; and in *Bell v. Brown* the court, referring to section 441, says: "It does not attempt to make any distinction between the two (verified and unverified pleadings,) or to make any rule which does not apply equally to both. The right to set up numerous defenses in a suit is equally as important to the defendant in the one case as in the other. It is an absolute right given him by law, and the principle is as old as the common law itself. * * * In many cases it would be an absolute denial of justice if a defendant should be shut out from setting up several defenses." The language in *Bell v. Brown,* relied on by respondent, is correct when applied to the averments of any single separate defense, but is not applicable to the whole of an answer which contains different distinct and separate defenses. This distinction was pointed out in subsequent cases. In *Buhne v. Corbett,* 43

Cal. 264, the court say: "A party defendant in pleading may plead as many defenses as he may have. If a plea or defense separately pleaded in an answer contain several matters, these should not be repugnant or inconsistent in themselves. But the plea regarded as an entirety, if it be otherwise sufficient in form and substance, is not to be defeated or disregarded merely because it is inconsistent with some other plea or defense pleaded. And there is no distinction in this respect between pleadings verified and unverified." See, also, *Billings v. Drew*, 52 Cal. 565; *Botto v. Vandament*, 67 Cal. 332; *McDonald v. Railway Co.*, 101 Cal. 206.

* * * * * * * * * *

The judgment and order appealed from are reversed, and the cause remanded for a new trial.[1]

[1] *Accord:* Westphal v. Nelson (1910), 25 S. D. 100; Covington v. Fisher (1908), 22 Okla. 207; Sturgis v. Slocum (1908), 140 Iowa 25; Welles v. Colorado Nat. Life Assur. Co. (1911), 49 Colo. 508.

SEATTLE NATIONAL BANK v. CARTER.

Supreme Court of Washington. 1895.

13 Washington, 281.

The opinion of the court was delivered by

DUNBAR, J.: This case was originally begun by the respondent in the equity department of King county, but, some questions of fact arising for determination between the appellant and the respondent, it was transferred to the law department in the Superior Court of said county. The notes in suit were made by the appellant as a subscription in aid of an enterprise in which he and a number of other persons were interested, viz. the building of a boulevard along the west short of Lake Union. At a meeting of those interested in the enterprise, at which appellant was present, he subscribed $2,500 towards carrying on the enterprise, and a committee was elected and appointed by the meeting as an executive committee to have full charge and control of the work. This committee consisted of L. H. Griffith, Edward Bluett, and C. E. Remsburg. The com-

mittee, through its manager, Griffith, afterwards sold the notes given by appellant to respondent, the Seattle National Bank.

* * * * * * * * * * *

The answer, as we have said, denies that the plaintiff was the owner and holder of said notes, or that they had been indorsed and delivered to it for a valuable consideration, or otherwise. The court in its instructions, to which the appellant duly excepted, charged the jury that under the pleadings in this case the only question for their consideration was the question of whether the notes were paid. The defendant, after his general denial, which was upon information and belief, affirmatively alleges the transfer of the notes to the plaintiff. He alleges, in his first affirmative defense, that the notes were executed and delivered to L. H. Griffith, Edward Bluett and C. E. Remsburg, and that, subsequently to the execution and delivery of the said notes, the said committee transferred them to the plaintiff, and, in another paragraph of the same affirmative defense, alleges the payment of these notes by L. H. Griffith to the respondent. The averment of the transfer of the notes to the respondent is repeated in the second affirmative defense, where it is also alleged that the respondent, for a valuable consideration, extended the time of payment of the notes, and by reason of such extension of time the appellant claims that he is exonerated from the payment of the notes. The allegation of transfer is again repeated in the third affirmative defense, and an agreement for the settlement and the compromise for the appellant's liability upon said notes is there averred, by which it is alleged it was agreed that certain lands owned by the appellant should be conveyed in full payment of the notes, and appellant alleges the conveyance of the said lands to George R. Carter as trustee for the respondent, in full payment of the said notes. He further alleges, in the third affirmative defense, that, subsequently to the maturity of the notes, he demanded the surrender to him and possession of said notes.

Now, the question under this pleading is, was the court justified in instructing the jury, in substance, that the question of ownership of the notes and transfer to the respondent was not for their consideration?

On this subject of inconsistent defenses there have been many conflicting decisions, but we think their origin has

been in a misunderstanding of the cases cited and relied upon as sustaining the doctrine that inconsistent defenses, under the reformed practice of pleading, could be maintained; and, secondly, a loose discussion and misapprehension of what inconsistent pleadings really are. The idea that inconsistent defenses, to the extent of being false defenses, could be tolerated under the code, has received a stimulus from the announcement of Mr. Pomeroy, in his excellent work on Remedies and Remedial Rights (section 722), that, "assuming that the defenses are utterly inconsistent, the rule is established by an overwhelming weight of judicial authority that, unless expressly prohibited by the statute, they may still be united in one answer. It follows that the defendant cannot be compelled to elect between such defenses, nor can evidence in favor of either be excluded at the trial on the ground of the inconsistency."

This announcement is attempted to be fortified by the citation of a large number of authorities. It was insisted by counsel for the respondent that an investigation of these authorities would show conclusively that they do not bear out the statement made by the author, and for the purpose of obtaining all the light possible on this question we have carefully examined the cases cited, and are forced to the conclusion that the learned author was unwarranted in making the assertion that the rule he announced was established by an overwhelming weight of judicial authority, or any weight of authority at all, under the code practice.

We think it legitimately follows, however, that if these inconsistent defenses are allowed to be pleaded, evidence under them cannot be excluded at the trial on the ground of the inconsistency. Then, if they are inconsistent to the extent that, if one of the averments in the answer is true, the other must be false, and we follow the rule, as we must, that, if it is a proper subject of allegation, it is a proper subject of proof, a court of justice is placed in the absurd position of listening to proof of a defendant tending to sustain one proposition, and in the next breath proving another proposition, the facts of which are inconsistent with the one just testified to. This theory, carried to its logical result, would permit a defendant who was sued upon a promissory note to allege nonexecution, want of consideration, and payment. Under such allegations he would be permitted to swear that he never executed the note; that he

did execute the note, but that it was without consideration; and that he *did* execute the note, that the consideration *was* good, but that he had paid the same. Such a practice as this would not only be farcical, but absolutely wrong and immoral, and an encouragement of perjury; and the example given is not extravagant, if the theory announced by the author be correct.

We take it that the only object of a lawsuit is the elicitation of truth, and that the only object of pleadings is to aid in determining the truth of the controversy. But the result of allowing pleadings to stand which are inconsistent, to the extent of being untrue, would have exactly the opposite tendency, and courts would simply become machines to aid unconscionable litigants in avoiding their just responsibilities. Under the common-law practice pleadings were based upon fictions, but the code has undertaken to work a revolution in that respect, and under its provisions it is the evident intention that the pleadings shall be based upon facts which are susceptible of proof. Our code provides that the complaint shall contain a plain and concise statement of facts constituting a cause of action, and while it does not, in so many words, provide that the answer shall contain a statement of facts, it does so, in substance, so far as any affirmative allegations are concerned; for the language of the code is that it shall contain a statement of any new matter, constituting a defense or counterclaim, in ordinary and concise language. It is true that it further provides that the defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal, or equitable, or both. This is all the authority there is for claiming that, under the code, the defendant is allowed to plead inconsistent defenses. It is true that he may set forth as many defenses as he has, but it could not have been the intention of the code that he should set forth anything that was not true; for, if it was not true, it would not be a defense. There certainly could have been no intention to have discriminated against the plaintiff by giving advantage to the defendant, so far as the pleadings are concerned. It is just as consistent to insist that the plaintiff may state in his complaint inconsistent causes of action, or facts constituting his cause of action which are inconsistent with each other, as to insist that the defendant may do so

in his answer. The evident intention of the code was to place them upon an equal footing,—to compel the plaintiff by his complaint, through the medium of a statement of facts, to inform the defendant what the true cause of action or complaint was; and it was just as much the intention of the framers of the code to compel the defendant, if he had an affirmative defense, to inform the plaintiff by his answer what that affirmative defense was. There can be no reason or right in any other theory. The object of the code was to simplify lawsuits. Whether it has succeeded in doing so may be questioned, but certainly it must be consistent with itself; and it would bring about untold confusion and bad results to undertake to ingraft into the code practice practices which were admissible under, and probably hormonized with, the theory of the common-law practice. The two are incongruous, and must be kept separate and distinct, and therefore the commingling of the two evolves a system which is worse than either.

* * * * * * * * * * *

In conclusion, this much, at least, must be demanded: That, however diversified the answers may be, they must all contain the essential element of truth, and if the admission of the truth of one answer necessarily proves the falsity of another, they cannot be allowed to stand, and the plaintiff will not be compelled to sustain the truth of an allegation the truthfulness of which is asserted by the defendant. The judgment will be affirmed.[1]

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

[1] *Accord:* Aull v. Missouri Pac. Ry. Co. (1909), 136 Mo. App. 291; Hilmer v. Western Travelers' Accident Ass'n. (1910), 86 Neb. 285; Fetzer v. Williams (1909), 80 Kan. 554; Rees v. Storms (1907), 101 Minn. 381; Gates v. Avery (1901), 112 Wis. 271; O'Donnell v. City of Butte (1911), 44 Mont. 97.

LOVELAND v. JENKINS-BOYS COMPANY.

Supreme Court of Washington, 1908.

49 Washington, 369.

FULLERTON, J.: This action was brought by the appellants against the respondent, to recover upon a written contract for the sale of jewelry. The contract in question

was in the form of an order, directing the appellants to ship to the respondent the jewelry described on a certain list to which the order was attached, on the terms printed thereon. The complaint set forth the contract, alleged its execution by the respondent and delivery to the appellants, the shipment of the goods ordered, their receipt by the respondent, and the failure and refusal of the respondent to pay for the same. For answer the respondent denied executing the written contract set out, or giving any written order for the goods described therein on the terms set out in the contract. And for a further and separate answer alleged in substance that it entered into an oral contract with the appellants to sell certain of its goods on commission, the kind and character of which were particularly described; that the appellants shipped it the goods described in the complaint; that upon the receipt of the goods it paid freight and drayage charges for their transportation from their place of shipment to the respondent's place of business, amounting to $6.85, the payment being necessary in order to obtain the goods from the carrier; that it thereupon proceeded to unpack the goods, when it discovered that the goods were not of the character or kind the appellants had agreed to furnish, nor were they goods that the respondent could handle in connection with the business in which it was engaged; that it immediately repacked the goods, and notified the appellants by letter that it would not receive the same, and would return them to the appellants on the repayment of the freight and drayage charges it had advanced; that the appellants replied to the letter, claiming that they had made a sale of the goods to the respondent, and held a written order for the same. It further alleged that this was the first time it learned that the appellants claimed to have a written order for the goods and averred that if the order bore the genuine signature of the respondent, such signature was obtained thereto by trickery and fraud, and without the knowledge of the respondent. It then set forth the manner in which the signature was obtained. * * *

The appellants moved to strike the answer, on the ground that it was inconsistent. This motion was denied, whereupon it demurred on the ground that the affirmative answer stated no defense. * * *

It is first assigned that the court erred in refusing to

strike the answer on the ground of inconsistency. It is argued that the answer contains both a denial and an admission of the execution of the contract, and that such answers are not permitted under the code. But we think the appellants mistake the effect of the answer. There is no admission of the execution of the contract. The averment in the separate answer is that the signature of the respondent to the writing purporting to be a contract was obtained by trickery and fraud, and without any intent on its part to enter into a written contract. Pleadings are construed according to their legal effect, and it is not a legal execution of a contract to procure the maker's signature thereto by trickery and fraud; and, when a person so defrauded is sued upon the purported contract, he may properly deny its execution, and plead affirmatively the fraud practiced upon him by which he was induced to apparently execute it. The question what constitutes inconsistent defenses received a somewhat elaborate consideration by this court in the case of *Seattle National Bank v. Carter,* 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177. Reviewing a case from Ohio, where the facts were similar to the facts in the case at bar, the court said:

"*Citizens' Bank v. Closson,* 29 Ohio St. 78, was an action by the bank against Closson upon a promissory note, alleged to have been made by him to R. R. Fenner & Co., and indorsed to the bank before due. Closson set up the following defenses: (1) He denied the execution of the note; (2) he alleged that if the signature to the note was his, it was obtained by a fraudulent and cunningly devised scheme or trick without his knowledge, setting forth the fact that he was induced by false and fraudulent representations of Fenner & Co. to sign certain papers, represented to be mere receipts or orders relating to a proposed agency for selling a patent invention, and that if he signed the note, his signature was procured by making him believe that he was signing one of the receipts or orders; that it was obtained without consideration, and that the bank had knowledge of these facts when it purchased the note. The Supreme Court very properly held, and could not have held otherwise under any system of pleadings, that these defenses were all open to the defendant. They are not in any sense inconsistent; for, even though the note was made as affirmed in the second defense, it would not be a legal exe-

cution of the note, and consequently does not contradict the first denial, viz., the denial of the execution of the note."

* * * * * * * * * * *

The judgment should be affirmed, and it is so ordered.[1]

HADLEY, C. J., and CROW, ROOT, MOUNT, RUDKIN, and DUNBAR, JJ., concur.

[1] *Accord*: Gibson v. Feeney (1912), 66 Wash. 531.

JONES v. WHITAKER.

Court of Appeals of Kentucky. 1911.

141 Kentucky, 484.

Opinion of the court by Judge CARROLL—Affirming:

In October, 1907, the appellants Sparks Jones and P. M. Baker, in connection with Isaac Goforth, brought this common-law action against the appellee, Whitaker, seeking to recover from him $1,500, the value of timber alleged to have been wrongfully and unlawfully cut and carried away by him from land owned by them.

In his answer and amended answers, Whitaker pleaded (1) that the plaintiffs did not own the land from which the timber was cut, or any part of it; (2) that in July, 1902, he purchased from Mamie and Jarvis Jackson the timber the plaintiffs were seeking to hold him responsible for, and that they were the owners of the timber and the land upon which it was standing at the time of his purchase; (3) that he purchased the timber from them without any notice that plaintiffs had any title to or interest therein; (4) that before he purchased the timber from the Jacksons he informed the plaintiff, Baker, who had a title bond for the land, that he was going to purchase the same, and was told by Baker that he had no interest in the timber, and was advised by him to buy it, and that relying upon the statements of Baker he did purchase it; and (5) that the plaintiffs, prior to his purchase, authorized the Jacksons to sell the timber to him.

The first complaint of appellants is that these defenses were inconsistent, and that their motion to require Whitaker to elect which of the defenses he would rely upon should have been sustained.

Section 95 of the Civil Code of Practice provides that an answer may contain:

"(1) A traverse. (2) A statement of facts which constitute estoppel against, or avoidance of, a cause of action stated in the petition."

And in section 113, subsec. 2, it is further provided that:

"A pleading may contain statements of as many causes of action, legal or equitable, and of as many matters of estoppel and of avoidance, legal or equitable, total or partial; and may make as many traverses; and may present as many demurrers as there may be grounds for in behalf of the pleader."

The only inhibition against the number and character of defenses or causes of action that may be asserted is that they shall not be inconsistent; the provision against inconsistent pleadings being found in section 113, subsec. 4, reading:

"If, however, a party file a pleading which contains inconsistent statements, or statements inconsistent with those of a pleading previously filed by him in the action, he shall, upon or without motion, be required to elect which of them shall be stricken from his pleading. But a party may allege, alternatively, the existence of one or another fact, if he state that one of them is true, and that he does not know which of them is true.

In construing these sections of the Civil Code, we held in *Smith v. Doherty,* 109 Ky. 618, 60 S. W. 381 (22 Ky. Law Rep. 1238), that the pleas of *non est factum* and no consideration were not inconsistent; saying that:

"On this subject the rule may be stated in the following language: Two or more pleas may be made if all may be shown to be true, and are inconsistent only when the proving of one necessarily disproves the other. This view assumes that defenses are inconsistent only when one in fact contradicts the other, and has nothing to do with a seeming and logical inconsistency which arises merely from a denial and a plea in confession and avoidance."

And this rule of practice and pleading was approved in *First National Bank of Paducah v. Wisdom,* 11 Ky. 135, 63 S. W. 461. Tested by the principle announced in these cases, the pleas made by the defendant were not inconsistent. He had a right to deny that the plaintiffs were the owners of the land, and in addition thereto to set up in avoidance of

their claim any matters of estoppel that he relied upon. His defenses that he was an innocent purchaser without notice, and also that he had notice of the claim of the plaintiffs, and was advised by them to purchase the timber, and that they advised the Jacksons to sell it to him, were merely estoppels against them. Although he may have known of the existence of plaintiffs' claim of title, yet if he was advised by them to purchase the timber or if they authorized the Jacksons to sell it to him he was in law an innocent purchaser of it, or, to put it in another way, the plaintiffs under these circumstances would be estopped to assert any claim against him. It is only when one plea is a direct and unequivocal contradiction in fact as well as in law of another plea that the pleas will be inconsistent. The case of *Minor & Sons v. Paragon Plaster Co.*, 124 S. W. 268, presents a good illustration of inconsistent pleas. In that case Minor & Sons were sued by the Paragon Plaster Company for the value of brick sold and delivered to them. For defense to the suit, Minor & Sons in their answer denied that they had bought any brick from the Paragon Plaster Company, and in an amended answer pleaded that they had bought the brick, but that the Paragon Plaster Company had committed a breach of its contract in failing to deliver the brick according to contract, and they sought to recover damages for this breach. Manifestly these two defenses were utterly inconsistent, and the court so held. The proof of one defense destroyed the other. If Minor & Sons proved that they bought the brick, this would necessarily defeat their defense that they had not bought them, and so, if their evidence showed that they had not bought the brick, this would necessarily defeat the defense that they had bought them.

We think the court properly overruled the motion of the plaintiffs to require the defendant to elect, as no evidence that defendant could properly introduce in support of either of his defenses would necessarily or logically disprove the truth of any other of his defenses. If he showed that the plaintiffs were the owners of the timber, this would not contradict the fact that as against him they were estopped to claim it. Nor would evidence in his behalf that at one time they did own the timber, and that he knew before his purchase that they had some title to it, necessarily

disprove the proposition that they were not the owners of it when the action was brought.

* * * * * * * * * * *

Upon the whole case we see no reason for disturbing the judgment, and it is affirmed.

CARUSO v. BROWN.

Court of Appeals of Kentucky. 1911.

142 Kentucky, 76.

Opinion of the court by WM. ROGERS CLAY, Commissioner —Affirming.

Appellant, Anthony Caruso, brought this action against appellee, John B. Brown, to recover on the following note: "2500.00. Cincinnati, Ohio, March 10th, 1908. On or before sixty days after date we promise to pay to the order of John B. Brown twenty-five hundred and no-100 dollars payable at the Citizens' National Bank of Danville, Ky., value received with interest at 6%. No. 1——. Due ——. Danville, Columbia & Scottsville Railroad Company, by J. F. Allen, President." Said note was indorsed as follows: "Cincinnati, O. Mch. 10th, 1908. For value received, I do hereby sell, transfer, and deliver the within note to Anthony Caruso and hereby guarantee the prompt payment of this note when due. John B. Brown, Liberty Township, Casey County, Ky." After setting forth the execution of the note, the petition charged that appellee Brown had signed and transferred the note in question to appellant, and had guaranteed the payment thereof. The petition concludes with an allegation to the effect that, after the maturity of the note, it was duly presented at the Citizens' National Bank of Danville, Ky., during banking hours, and payment thereof refused. To the petition appellee filed an answer interposing several defenses. In the first paragraph he denied the allegations of the petition. In the second paragraph he charged that the obligation sued on was simply an obligation of the Danville, Columbia & Scottsville Railroad Company, and was known by appellant to be such, as well as accepted by him as such. Then follows an allegation that the note had been paid by the acceptance

by appellant of certain shares of stock. Paragraph 3 contained a plea of fraud, and charged that by the fraud of appellant and his attorney he was induced to indorse the note in the belief that he was acting in his official capacity as treasurer of the railroad company, and it was necessary for him to indorse the note in order to bind that company, that he signed the note without knowing that he became bound in his individual capacity, and would not have signed it except for the fraud of appellant and his attorney. By paragraph 4 appellee pleaded that the sum of $833.33 1-3 was paid on said note on or about March 24, 1908, and that appellant accepted same in full discharge of any obligation he had against appellee. It will not be necessary to consider paragraph 5, as a demurrer was sustained to it. Other pleadings were filed, completing the issues. The trial before a jury resulted in a verdict for appellee. From the judgment based thereon, this appeal is prosecuted.

* * * * * * * * * * *

* * * The only two grounds relied upon for reversal are (1) the failure of the court to require appellee to elect which of the defenses set out in his answer he would rely upon; and * * *

Under the rule now in force, very great latitude is allowed a defendant in the number and character of defenses he may interpose to an action. For the purpose of determining whether defenses are inconsistent or not, the law divides them into two classes: First, those which are inconsistent and contradictory in point of fact; second, those which are merely technically inconsistent by implication of law. Where the defenses involve mere logical inconsistencies or inconsistencies by implication of law, they may be pleaded together; but defenses contradictory or repugnant in fact cannot be joined. In other words, a defendant will only be required to elect between defenses where the facts stated in the pleadings are so inconsistent that, if the truth of one defense be admitted, it would disprove the other. *Smith v. Doherty*, 109 Ky. 617, 22 Ky. Law Rep. 1238; *First National Bank v. Wisdom's Ex'r*, 111 Ky. 135, 23 Ky. Law Rep. 530; *Spencer v. Society of Shakers*, 64 S. W. 468, 23 Ky. Law Rep. 854. While it is true that appellee denied the execution of the note and the fact that he had obligated himself to pay it, it is perfectly apparent from that paragraph of the answer and the other paragraphs that its pur-

pose was merely to deny that he had indorsed the note and guaranteed its payment in his individual capacity. The traverse was a mere technical one, and must be considered in connection with the averments in the other paragraphs. Considered in this light, there is no conflict between paragraph 1 and paragraph 2, for the latter simply charges that the note was as a matter of fact the note of the railroad company and not that of appellee. It is consistent therefore with the denial of facts contained in the first paragraph.

Nor is there any inconsistency between paragraph 1 and paragraph 3. Paragraph 3 makes paragraph 1 a part thereof. Paragraph 1, in effect, denies that the note sued on was appellee's individual obligation, while paragraph 3 makes plain why this allegation was made; that is, it shows that appellee indorsed the note upon the assurance that he was simply being bound in his official capacity. The effect of the two paragraphs, therefore, is to show that he was bound only in his official capacity, and not in his individual capacity. There is no inconsistency in fact between paragraph 2 and paragraph 4. Paragraph 2 contains really a plea of payment, while paragraph 4 attempts to make a plea of accord and satisfaction. Our conclusion, then, is that, where it is attempted to charge a person with liability on a note in his individual capacity, he may deny the execution of the note in that capacity and may also plead payment, fraud, and accord and satisfaction, and that none of these pleas would be so inconsistent in fact that the proof of one would tend to disprove the other.

* * * * * * * * * *

Finding no error in the record prejudicial to the substantial rights of appellant, it follows that the judgment must be affirmed; and it is so ordered.

HART-PARR COMPANY v. KEETH.

Supreme Court of Washington. 1911.

62 Washington, 464.

DUNBAR, C. J.: This is an action to recover money on a check and notes which were lost. The complaint, among

other things, alleged that on the 17th day of January, 1908, plaintiff sold to the defendant a certain gasoline traction engine, for a consideration of $2,500, which sum it was agreed should be paid to the plaintiff according to the terms of defendant's written obligation and contract, a copy of which was made a part of the complaint; that the plaintiff delivered the engine in due time; that the defendant has since said time had the same in his possession and under his control, and has kept and used said engine for the purpose of plowing and other purposes since the delivery thereof; that on the date of the delivery the defendant, in settlement therefor and in compliance with the terms and conditions of the written obligation executed and delivered to the plaintiff a certain written check and promissory notes for a certain amount of money as stated in the complaint, and at the said time, to secure the payment of the same, executed and delivered to plaintiff a certain chattel mortgage in writing, covering the said gasoline engine sold and delivered as aforesaid; that the said papers were delivered to one C. A. Bellinger, the agent of the plaintiff, who placed them in an envelope and put them in his grip or satchel, which was then placed in defendant's barn, where it was left while said agent went into defendant's field to assist in properly starting the engine; that, upon returning from the field, Bellinger discovered that the check, notes and mortgage were missing from the grip; that the same had not been found up to the hour of the commencement of this action; that they are lost or stolen, and cannot be found; that the plaintiff had demanded and requested of the defendant the giving of other notes and checks upon security to the effect that he would not be held responsible for the notes and check so lost; that this action, in short, was brought to re-establish such lost papers, that the plaintiff be declared to be entitled to exercise its option declaring said notes and mortgage due and payable at once, and that it recover the amount due as specified in the complaint, and that the court fix the amount of security or indemnity, if any, the plaintiff shall furnish the defendant for and on account of said notes, and judgment be entered on account thereof; and prayed for equitable relief.

The defendant, answering generally denied the allegations of the complaint, and in substance, by way of affirmative defense, alleged that the notes, check, and mortgage

mentioned in the complaint were delivered conditionally to Bellinger, and were not to be of any force or effect whatever unless the engine did as Bennett, the agent of the respondent, and the appellant agreed it should do before the notes, mortgage, and check would be effective; that the engine did not develop the power it was agreed it should before the check, notes, and chattel mortgage were to be effective; that they never did become effective or of any force or value; and that they never were delivered. The second affirmative defense was that another action was pending in the same court between the same parties for the same cause of action, and was still undetermined. The third affirmative defense was a counterclaim or set-off, the defendant claiming that, by breach of the contract upon which the plaintiff sued, he incurred a loss of $150 by reason of the loss of time; that the engine was not worth more than $1,250 at any time by reason of the insufficiency of its power; and that defendant was damaged thereby in the sum of $1,250; and asked that the same be allowed as a counterclaim to anything that might be recovered in favor of the plaintiff. Thereupon the plantiff made a motion, requiring the defendant to elect on which one of his defenses he would rely at the trial on the ground that they were inconsistent. The court made an order, granting the motion and requiring the defendant to elect; to which ruling the defendant excepted, and thereupon elected in open court to stand upon its first affirmative defense, which we have mentioned above. The plaintiff filed a reply to this. A jury was demanded by the defendant and refused by the court. The court proceeded to trial of the cause upon the first affirmative defense, and found against the defendant on all the issues. Judgment was entered, and this appeal is taken, assigning two errors of the court: (1) In granting the motion of respondent to require the appellant to elect upon which one of his defenses he would stand; and (2) in denying the defendant a jury trial.

From a perusal of these pleadings we are forced to the conclusion that the third affirmative defense is inconsistent with the first affirmative defense. It is doubtless true that, under the letter and the spirit of the code as announced by the court and cited by appellant, there is no classification of answers or defenses as at the common law that pleas in abatement and at bar may be joined; and that defendant

can and should unite all the defenses he has in one answer. But all these privileges are subject to the vital requirement that the defenses must not be inconsistent; that is to say, that the establishment of the truth of one defense must not establish the falsity or impossibility of the other. This question was exhaustively examined and discussed by this court in *Seattle National Bank v. Carter,* 13 Wash, 281, 43 Pac. 331, 48 L. R. A. 177, and, after an examination and analysis of all the available authorities, it was held that inconsistent defenses were not permissible under the code; that the plaintiff would not be compelled to establish the truth of an allegation in his complaint to which such defenses were set up; and that defenses were inconsistent when one or the other must necessarily be untrue; and this doctrine has never been departed from by this court. It is true that the doctrine should be applied with caution, and that not all seemingly inconsistent defenses are actually inconsistent; for it is sometimes necessary to make a denial which is in reality a denial of a conclusion of law instead of a fact. For instance, there may be a denial of delivery of certain property because, in the opinion of the pleader, the acts surrounding the circumstances do not constitute a legal delivery; and on that question he has a right to the holding of the court. The same rule applies to a denial of the execution of certain contracts, where it develops that the contract which defendant signed had afterwards been changed and the defendant denied its execution on the theory that in law it was not the contract which he signed; though in a case of this kind the answer is not logical under the provisions of the code, and it would be more in harmony with its spirit to simply state the facts under which the documents in question was signed, and, if the facts stated constitute a defense, of course the court will construe the answer to be a denial of the allegation of execution. But in all cases of this kind, and especially cases from this court, will be found the qualifying demand that there shall be no direct contradiction in the facts pleaded. The object of a lawsuit is to elicit the truth concerning the facts which are the subject of the controversy, and the object of pleadings is to aid in such elicitation and determination. But such consummation cannot possibly be aided by pleadings of this kind. On the other hand, the result will be to embarrass and hinder the proper administration of justice. So

that the crucial question in this case is: Were these affirmative defenses so inconsistent that the facts stated in one must necessarily be false if the facts stated in the other are accepted as true? If it is true that the notes and check were not executed or delivered under the contract set forth in the complaint; that there was no such contract entered into at all; but that, on the other hand, the contract was simply an agreement to try out the machine and to enter into a future contract if it proved satisfactory, which was in substance the first affirmative defense, together with the allegation that it did not prove satisfactory and did not meet the stipulated requirements; and that no contract was ever entered into—these facts are inconsistent with the statements made in the third affirmative defense, for it is not conceivable that there is any room for a counterclaim growing out of a contract which was never executed and to which the defendant was never a party. This is in reality a partial defense, and must be based upon something; and, if it is based upon anything, it is upon the fact denied in the answer, viz., that the notes, check, and mortgage had ever been delivered, or that the contract sued on had ever been executed.

* * * * * * * * * * *

The judgment is affirmed.

PARKER, MOUNT and FULLERTON, JJ., concur.

STEENERSON v. WATERBURY.

Supreme Court of Minnesota. 1893.

52 Minnesota, 211.

COLLINS, J.:

* * * * * * * * * * *

1. There was a general denial in the answer by which the allegations of the complaint as to the rendition of the services, and that they were performed at defendants' request, were put in issue, and this denial was followed by a special averment that prior to the commencement of the action defendants had paid plaintiff in full of all demands, including that set forth in the complaint. The position of

plaintiff was, and is, that, because of an inconsistency between the general denial and the special plea of payment, the latter controlled, and it stood admitted on the trial that the professional services were rendered at defendants' request. Under our system of pleading, a defendant may set up as many defenses as he may have; the only limit to this right being that they must not be inconsistent. Separate and distinct defenses are consistent when both may be true, and are only held inconsistent when the proof of one necessarily disproves the other. These allegations did not stand opposed to the extent that, if one should be established by testimony, the other would of necessity be proven untrue; for the fact might be that plaintiff's services had been rendered without defendants' request, and yet have been considered and taken into account in a subsequent settlement, at which they paid plaintiff in full of all demands. There exists no good reason why one should not be permitted to settle a claim for services which he regarded as unjust, because no services have been required, without having his act construed to his prejudice.[1]

* * * * * * * * * * *

[1] A general denial and a defense of contributory negligence are not inconsistent: Kimble v. Stackpole (1910), 60 Wash. 35; Lichtenstein v. Hudepohl Brewing Co. (1908), 31 Ohio Cir. Ct. R. 204.

A general denial in slander and defense of mitigation are not inconsistent: Anderson v. Shockley (1911), 159 Mo. App. 334.

SECTION 5. ANSWERS IN ABATEMENT.

NEEDHAM v. WRIGHT.

Supreme Court of Indiana. 1894.

140 Indiana, 190.

HOWARD, J. * * *

While a plea in bar is a denial of the existence of the alleged cause of action itself, a plea in abatement is merely a denial of the right to bring the present suit. The plea in abatement amounts, therefore, to a tacit admission of the cause of action; it is a dilatory plea.

In 1 Chit. Pl. (16th Am. Ed.) 462, it is said: "The criterion or leading distinction between a plea in abatement

and a plea in bar is that the former must not only point out the plaintiff's error, but must show him how it may be corrected, and furnish him with materials for avoiding the same mistake in another suit in regard to the same cause of action, or, in technical language, must give the plaintiff a better writ."

It is further said in the same authority (page 473) that, "as pleas in abatement do not deny and yet tend to delay the trial of the merits of the action, great accuracy and precision are required in framing them. They should be certain to every intent, and be pleaded without any repugnancy."

In Steph. Pl. (9th Am. Ed.) 352, it is said that dilatory pleas "are regarded unfavorably by the courts as having the effect of excluding the truth"; and, therefore, that they "must be certain in every particular, which seems to amount to this: that they must meet and remove by anticipation every possible answer of the adversary." And, at page 431, it is said in the same work: "The plea must, at the same time, correct the mistake, so as to enable the plaintiff to avoid the same objection in framing his new writ or declaration."

In Gould, Pl. §§ 52, 57-59, in speaking of the certainty required in pleas in abatement other dilatory pleas, the rule is stated even more strongly: "Certainty of the third sort, or to a certain intent in *every particular,* requires the utmost fullness and particularity of statement, as well as the highest attainable accuracy and precision; leaving, on one hand, nothing to be supplied by intendment or construction, and, on the other, no supposable special answer unobviated. The rule requiring this degree of certainty is a rule, not of *'construction'* only, but also of *'addition';* that is, it requires the pleader not only to answer fully what is necessary to be *answered,* but also to *'anticipate'* and exclude all such supportable matter as would, if alleged on the opposite side, *defeat* his plea." The rule, as thus given by the text writers, is followed in this state. *Board of Com'rs. v. Lafayette, M. & B. R. Co.,* 50 Ind. 117; *Kelley v. State,* 53 Ind. at page 312. See, also, 1 Am. & Eng. Enc. Law, 11, and notes.[1]

* * * * * * * * * * *

[1] *Accord:* Kunkle v. Coleman (1910), — Ind. App. —, 92 N. E. 61; Reed & Co. v. Harshall (1910), 12 Cal. App. 697; Needham v. Wright (1895), 140 Ind. 190.

CALLAHAN COMPANY v. WALL RICE MILLING COMPANY.

Appellate Court of Indiana. 1909.

44 Indiana Appellate, 372.

HADLEY, C. J. This is an action brought by appellant against appellee, a foreign corporation, to recover on breach of contract. Service was had on one Geyer; he, as the return of the sheriff states, "being the agent of said defendant (appellee) and said defendant (appellee) having no officer and no other agent in said county." To the action appellee filed an answer in abatement, to which appellant demurred for want of facts, which demurrer was overruled, and, appellant refusing to plead further, judgment was rendered against it. The ruling of the court on this demurrer is the only error assigned.

The answer seeks to abate the action for the reason that appellee had no agent in the county at the time the action was brought; that Geyer, who was served with summons, was not its agent and never had been its agent. A plea in abatement, being a dilatory plea, is construed with much greater strictness than an ordinary plea in bar, and no intendment can be taken in its favor. Works Pr. & Pl. (2d Ed.) § 576; *Rush et al. v. Foos Mfg. Co.*, 20 Ind. App. 515.

Such pleas must contain the utmost fullness and particularity in statement in every respect, as well as the highest attainable accuracy and precision, leaving, on the one hand, nothing to be supplied by intendment, and, on the other, no supposable special answer unobviated. *Rush et al. v. Foos Mfg. Co., supra;* Gould's Pl. § 57; *Capwell v. Sipe,* 17 R. I. 475, 33 Am. St. Rep. 890; *Mandel v. Peet,* 18 Ark. 236; *Tweed v. Libbey,* 37 Me. 49; *Needham v. Wright,* 140 Ind. 190; *Moore v. Morris,* 142 Ind. 354.

Suits may be instituted in this state against foreign corporations under two conditions: First, when such corporation has an office or agency in this state for the transaction of business, suit may be brought in the county where such office or agency is located and an action growing out of or connected with the business of such office or agency (Burns' Ann. St. 1908, § 311; *Debs v. Dalton et al.,* 7 Ind. App. 84; *Rush v. Foos Mfg. Co., supra*); second, when

such corporation has property, money, credits, or effects belonging to or due such corporation in the county where suit is brought (Burns' Ann. St. 1908, § 316).

The plea negatives all the conditions in section 311, *supra,* except it does not aver that it had no office in the county where and when the suit was brought, but does not negative any of the conditions of section 316, *supra.* Neither does the plea in abatement deny that appellee had no officer within the county upon whom service might be had; nor does it aver that Geyer was not such an officer; nor that any other summons had not been served on any other proper person. Since the plea seeks to abate the action for the reason that service has been had upon one not an agent of the company, to succeed, it must exclude every possibility that proper service might not have been had in the action. *Shampeau v. Connecticut, etc. Co.* (C. C.), 37 Fed. 771; *Moore et al. v. Morris, supra; Burchard v. Record* (Tex.) 17 S. W. 241; *Pearson v. French,* 9 Vt. 349; *Morse v. Nash Trust,* 30 Vt. 76; *Tweed v. Libbey, supra; Adams v. Hodsdon,* 33 Me. 225; *Tweed v. Libbey, supra.*

In the case last cited, the court say: "The degree of certainty required in a plea in abatement is such as to exclude all such supposable matter as would if alleged on the opposite side defeat the plea. * * * The plea in this case is clearly bad. Every allegation therein may be true, and the service of the writ sufficient. * * * Other modes of service are provided." And in the case of *Burchard v. Record, supra,* the court say: "It is now well settled that the sufficiency of a plea in abatement, like the present, must be tested by its own averments, and, unless they exclude every exception which under the law would confer jurisdiction, the plea is fatally defective, if called in question by exceptions." And the plea cannot be aided by reference to the process or other papers in the case where they are not made a part of the plea.

In *Pearson v. French, supra,* the court say: "No intendment is to be made in favor of a plea in abatement, but every reasonable intendment should be made in favor of the regularity and sufficiency of the proceedings. And here, as the defendant has not made the writ and officer's return a part of his plea by craving oyer, and setting them

forth, or, indeed, by referring to them, we cannot look beyond the plea to cure any of its defects."

* * * * * * * * * * *

Judgment reversed, with instruction to sustain appellant's demurrer to the plea.

McKIM v. DISTRICT COURT.

Supreme Court of Nevada. 1910.

33 Nevada, 44.

NORCROSS, C. J. An action for divorce was instituted by Margaret E. McKim, as plaintiff, against Smith H. McKim, as defendant, in the Second Judicial District Court of the state of Nevada, in and for the county of Washoe, before Honorable W. H. A. PIKE, district judge. The said defendant, petitioner herein, through his attorney, James Glynn, served notice upon the plaintiff, Margaret E. McKim, that upon a time certain he would move the said district court for an order permitting him to appear specially in the action for the purposes of filing a plea in abatement, raising the question of the jurisdiction of the said district court to try the action for divorce, upon the ground that the plaintiff, the said Margaret E. McKim, was not at the time of the filing of her complaint, nor for six months immediately prior thereto, nor at all, a bona fide resident of the said county of Washoe or of the state of Nevada, as alleged in her complaint. The motion came on regularly to be heard and was denied by the court.

The said defendant has instituted this original proceeding in this court and prayed for an order requiring the respondent to appear and show cause why the plaintiff should not be permitted to file his said plea in abatement, and to appear specially for such purpose; and further, that the said district court be restrained from rendering a default in said action against said defendant, and from proceeding further to try the said action upon the merits thereof, or to render any judgment therein upon the merits, until the further order of this court.

* * * * * * * * * * *

Our practice act does not permit the filing of a plea in abatement as a pleading separate or distinct from the answer. Matters in abatement or in bar may only be set up in the answer. Bliss on Code Pleadings, § 345, says: "In common-law pleadings we have the rule that 'pleas must be pleaded in due order;' that is, the dilatory pleas must be first made and disposed of, to be followed by pleas in bar. The code requires the defendant either to demur or answer, and in his answer he is allowed to set up as many defenses as he may have. Only one answer is contemplated, and all the defenses which he elects to make must be embraced within it. Matter in abatement is as much a defense to the pending action as matter in bar, and to say that the defendant may reserve the latter until a trial shall have been had upon the issues in regard to the former would interpolate what is not in the statute—would be inconsisent with its plain and simple requirements." Sutherland on Code Pleadings, vol. 1. § 459, says: "Pleas, by that name, are unknown to the code. The only pleadings, on the part of the defendant, are demurrer and answer. * * *" See, also, *Preston v. Culbertson,* 58 Cal. 198; *Wells v. Patton,* 50 Kan. 732.

The defendant, petitioner herein, may set up in his answer such defenses to the plaintiff's alleged cause of action as he may have. It is well settled in states having a code procedure like ours, that the defendant only has two pleadings, a demurrer to the complaint, and an answer. Where the answer raises a question which is preliminary to the right of the court to determine the merits of the action, the better procedure would be for the trial court to determine it first before proceeding to consider the issues which go to the real merits of the action.

It is the duty of courts in divorce proceedings to see that the proof of residence is clear and convincing, and that a fraud is not being perpetrated upon the court. *Phillips v. Welch,* 11 Nev. 187. Having attempted to attack the validity of the plaintiff's residence, although in a manner not recognized by our procedure, the trial court will doubtless permit the defendant a reasonable opportunity to file an answer in the case. A question as to the sufficiency of the evidence to establish residence upon the part of the complainant in a divorce proceeding must be taken by appeal, and not by original proceeding. *People v. Sur-*

rogate's Court, 36 Hun (N. Y.), 218; *People v. Surrogate of Putnam,* 16 Abb. N. C. 241; *Preston v. Trust Co.,* 94 Ky. 295; *State v. Superior Court,* 11 Wash. 111.

This proceeding is dismissed.[1]

SWEENEY and TALBOT, JJ., concur.

[1] *Accord:* Dudley v. Wabash R. R. Co. (1911), 238 Mo. 184; Kingman-St. Louis Imp. Co. v. Brantly Bros. Co. (1909), 137 Mo. App. 308; Gardner v. Clark (1860), 21 N. Y. 399; Garretson v. Ferrall (1894), 92 Iowa 728; Union Guaranty & Trust Co. v. Craddock (1894), 59 Ark. 593; Linton v. Heye (1903), 69 Neb. 450; Louisville Home Telephone Co. v. Beeler's Adm'x (1907), 125 Ky. 366.

Contra: La Grande v. Portland Public Market (1911), 58 Ore. 126; Harrison v. Birrell (1911), 58 Ore. 410; Carmien v. Cornell (1897), 148 Ind. 83.

SECTION 6. COUNTERCLAIMS.

(a) General Nature.

GENERAL ELECTRIC COMPANY v. WILLIAMS.

Supreme Court of North Carolina. 1898.

123 North Carolina, 51.

DOUGLAS, J. * * *

* * * The plea of payment is essentially different from set-off or counterclaim, in its nature, its origin, and its result. A payment *pro tanto* extinguishes the debt *eo instanti,* and is itself thereby extinguished, so that neither remains any longer the subject of an action. On the contrary, a counterclaim, which now includes a set-off, is the assertion by the defendant of an independent demand which might be maintained in an independent action. Payment was a good defense at common law, and from time immemorial was regarded as a valid plea in bar. Set-off, except in some few instances of equitable jurisdiction, rests purely upon statute, and was unknown to the common law, which could not conceive of the defendant ever being an actor. It originated in the bankrupt act of 4 & 5 Anne, c. 17, suggested perhaps by the *compensatio* of the civil law, but was given general application by the statutes of 2 Geo. II. c. 22, and 8 Geo. II. c. 24, which enact "that, where there are mutual debts between the plaintiff and defendant, one

debt may be set against the other, and either pleaded in bar or given in evidence upon the general issue at the trial, which shall *operate as payment*, and extinguish so much of the plaintiff's demand." 3 Bl. Comm. 304. Payment extinguished the debt at the time of payment, while a set-off required mutual existing debts, and operated as payment only when pleaded, and by judgment of the court. The difference is thus stated by Judge Henderson in *McDowell v. Tate*, 12 N. C. 249, 251: "A payment is, by consent of the parties, either expressed or implied, appropriated to the discharge of a debt. A set-off is a mutual, independent claim, which still continues to exist as such, and one which the parties did not intend should be appropriated to the satisfaction of an existing demand, but that each should have mutual causes of action, and of course mutual actions, if they please, against each other." This distinction is of vital importance in the determination of the case at bar, as well as the proper understanding of the decisions of this court.

The counterclaim is the creature of the code, and is an extension of the set-off, enlarging the class of claims that may be pleaded, and enabling the defendant to obtain judgment for the excess. Code, § 244, provides that: "The counter-claim mentioned in the preceding section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. (2) In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

It is said in *Hurst v. Everett*, 91 N. C. 399, 403, that a counterclaim includes both set-off and recoupment, and in fact every defense to the action, except a demurrer, which does not amount to a plea in bar. It is true that recoupment and set-off are now both counterclaims, and yet they are essentially different from each other. We have seen that the set-off was of statutory origin, and applied only to mutual, independent claims; the defendant's claim necessarily arising out of a transaction extrinsic to the plaintiff's cause of action. On the contrary, recoup-

ment always arises out of the same cause of action, or matters directly connected therewith, and was recognized at common law. In fact, it was a defense going to lessen or defeat the plaintiff's recovery, by showing damages sustained by the defendant from a breach by the plaintiff himself of the very contract upon which his action was based, or fraudulent misrepresentations by which the defendant was induced to enter therein. As it was a pure defense there could be no excess recovered by the defendant. It is now included in the first class of counterclaims allowed by the code, and yet, as held in *Hurst v. Everett, supra*, it is still available in some cases as a pure defense.

* * * * * * * * * * *

STATE v. ARKANSAS BRICK AND MANUFACTURING COMPANY.

Supreme Court of Arkansas. 1911.

98 Arkansas, 125.

This action was instituted by the state to recover from the defendant $17,726.55, claimed to be due from the defendant for convict labor.

On the 31st day of July, 1899, the state entered into a contract with the defendant, by which it agreed for a term of 10 years, beginning January 1, 1900, to furnish the defendant 300 able-bodied men per day, on demand. For this labor the defendant undertook to pay 50 cents per day for each convict. After the expiration of the 10 years, a number of convicts were allowed to remain with the defendant for a short time, and the complaint states that of the amount sued for, $12,898.65, was for a balance due for convicts furnished during the life of the contract, and $4,827.90 for such as were furnished after the expiration of the 10 years mentioned in the contract. The charge by the state for the first of these items was at the contract price of 50 cents per day, but for the second item, the charge was for the reasonable value of the services of the convicts.

The answer admits that after the 1st day of January, 1909, the date of the expiration of the contract, the labor of certain convicts was furnished to the defendant by the plain-

tiff; and the answer alleges that this labor was furnished under and pursuant to the contract, or, as contended on the trial, to make up in part for the failure to furnish the full number. The answer also denies the indebtedness, and by a counterclaim, sets up damages sustained by reason of the failure of the state to furnish 300 convicts per day. The damages claimed by the defendant in the counterclaim exceed the amount claimed by the state in the original complaint.

During the 10 years, and until the last month or two before the expiration of the contract, the defendant paid the state each month what it owed for the convicts furnished. It is also shown that during the 10 years, the defendant from time to time demanded that the state should perform its undertaking and furnish convicts to the number of 300 per day.

NORTON, Special Judge (after stating the facts). It is not contended on the part of the state that it performed its agreement to furnish the 300 convicts, but it is insisted for the state that by defendant's course of dealing—settling monthly for such number of convicts as it had—the defendant waived its right to full compliance by the state. It is also contended for the state that a cross-demand of counterclaim or recoupment cannot be made against the state, as that would, in a sense, be permitting the state to be made a defendant; and it is further contended in behalf of the state that, even if counterclaim or recoupment can be allowed at all in this case, it must be confined to so much of the cause of action as is due for labor furnished under the contract, and that labor furnished after the expiration of the contract is not sufficiently connected with the plaintiff's cause of action to be made subject to the cross-demand of counterclaim or recoupment.

The contention on the part of the state that defendant waived its right to the full number of men mentioned in the contract we do not find supported by the testimony. While the defendant, with the exceptions mentioned, paid monthly for such convicts as were furnished, it is, on the other hand, proved that it at all times demanded the full number of men from the state. In this respect, as in others the findings of fact by the chancellor are well supported by the testimony.

The findings of fact by the chancellor include the failure

of the state to furnish the convicts as agreed, and a damage sustained by the defendant in a sum in excess of the amount claimed by the state.

With the facts in this way determined, the remaining question is one of applying law.

That a counterclaim could not be maintained against the state for any balance the defendant might be entitled to over and above the amount of the state's claim is conceded. But counsel for the state go further and contend that even to allow recoupment to the amount of the state's claim is equally prohibited.

The right of the state to be held exempt from the recovery of judgments against it is no clearer than the right of a defendant, in a suit by the state to avail himself of all and every character of defensive pleas, except limitation. *State v. Morgan,* 52 Ark. 150, 12 S. W. 243. He cannot by a cross-action have an affirmative judgment against the state for any excess he may be entitled to over and above the state's claim; but this is the extent of his disadvantage from having dealt with the sovereign.

The law of recoupment requires some consideration, and a distinguishing of it from the idea usually conveyed by the word "counterclaim." Counterclaim and recoupment are alike in the sense that each must grow out of, or be connected with, the transaction upon which the palintiff sues. Recoupment was allowed at common law (*Desha's Ex'rs v. Robinson, Adm'r,* 17 Ark. 245), but a counterclaim was not. Recoupment was considered a defense, and prior to the adoption of the code, if the defendant's cross-demand against the plaintiff exceeded the plaintiff's demand, the defendant could use his demand in recoupment only by sustaining a loss of the excess. Hence, prior to the code, the defendant could recover on his cross-demand to the full extent only by an independent action. The code, to prevent a multiplicity of suits, provided for the counterclaim, and that the defendant might recover on it in the same suit any balance that the plaintiff owed him over and above the plaintiff's demand. The counterclaim thus became an affirmative cross-action, which ordinarily will cover all purposes of recoupment, but not always. A right left to the defendant to be worked out through the doctrine of recoupment which could not be had through a counterclaim, is to use defensively a cause of action which, as a counterclaim,

would be barred by lapse of time. A counterclaim must be an existing cause of action, but recoupment is a right to reduce the plaintiff's claim, and this right exists as long as the plaintiff's cause of action exists. A breach by the plaintiff, though barred as an independent cause of action, continues to exist for defensive purposes, available to the defendant, so long as the plaintiff may sue upon any breach by defendant. *Williams v. Neely,* 134 Fed. 1, 67 C. C. A. 171, 69 L. R. A. 232; *Beecher v. Baldwin,* 55 Conn. 419, 12 Atl. 401, 3 Am. St. Rep. 57; *Aultman & Co. v. Torrey,* 55 Minn. 492, 57 N. W. 211; Wood on Limitations (3d Ed.), § 282; *Conner v. Smith,* 88 Ala. 300, 7 South. 150; *Soudan Planting Co. v. Stevenson,* 128 S. W. 574.

We refer to this right to use barred cross-demands, not because the question is involved in this case, but to show the defensive character of the plea of recoupment, and that it is a common-law right which the code makers could not have intended to abolish, or in any wise impair. The whole spirit and plan of the code was to liberalize the procedure and to extend, instead of curtailing, remedial rights. If express warrant for recoupment in the letter of the code should be contended for, it can well be found in the right to plead "new matter constituting a defense." Kirby's Digest, § 6098, subd. 3.

* * * * * * * * * * *

MCCULLOCH, C. J., and FRAUENTHAL, J., concur in part of the judgment and dissent as to part.

WALKER v. AMERICAN CENTRAL INSURANCE COMPANY.

Court of Appeals of New York. 1894.

143 New York, 167.

This was an action upon a policy of fire insurance issued by defendant.

The complaint set up the issuing of the policy on February 1, 1891, insuring the property from that time for one year; that the property insured was damaged by fire to the full amount of insurance on February 6, 1891; that

due proofs of loss were furnished and judgment for the amount of the policy was demanded and refused. Defendant's answer admitted the destruction by fire of the property insured on the day specified, and the issuance of the policy, but denied that the proofs of loss furnished were in accordance with the terms of the policy and all other allegations of the complaint except those admitted, and set up as a counterclaim that the policy in suit was issued by mistake; that it was in fact intended as a renewal of another policy issued by defendant on the same property expiring February 17, 1891, and was issued under an agreement between plaintiff and defendant's agent for such renewal, but by mistake was made to take effect February 1, 1891, although it was not intended it should take effect until February 17, 1891, and judgment was demanded that the complaint be dismissed. A further affirmative judgment was also demanded that the policy in suit be so reformed that the risk mentioned in it should take effect February 17 instead of February 1, 1891, and that the court adjudge it to be a renewal of the policy expiring February 17, 1891, and not as an additional insurance. No reply was served. Upon the trial the court held that the matter set up by defendant in his answer as a counterclaim did not constitute one and that no reply was necessary.

FINCH, J.: What is pleaded in the defendant's answer as a counterclaim, and asserted to have become conclusive because no reply was served, is, in our judgment, simply and only a defense. Facts pleaded, which controvert the plaintiff's claim, and serve to defeat it as a cause of action, are inconsistent with the legal idea of a counterclaim, which is a separate and distinct cause of action, balancing in whole or in part that asserted by the plaintiff. *Prouty v. Eaton*, 41 Barb. 409. It meets the latter, not by a denial of it, or an attack upon its existence, but by opposing to it an equal or balancing demand on the part of the defendant. In this case, what is averred to be an equitable counterclaim is, in its legal effect, an allegation that plaintiff's cause of action never in fact existed; that the seeming evidence of it was the product of a mistake, and not the true record of a contract; and that the risk of a second insurance for $1,000, for which the action was brought, was never in fact taken or assumed by the defendant company. In brief, the answer denied the making of the contract alleged, or any

liability upon it. Of course, if true, that was a complete defense, and nothing but a defense, and could not be turned into an equitable counterclaim by asking a reformation of the writing. Any such relief was needless, and of no possible consequence. When the facts pleaded should be proved, their inevitable first effect would be to disprove and defeat the plaintiff's claim, and that result would furnish a remedy complete and perfect, and leave the defendant in a position of entire safety, and needing for the protection of its rights no further or other judgment or relief; for the reformation sought would turn the policy sued upon only into an agreed renewal of a policy already matured and settled. There was nothing left upon which such a renewal could operate. The property had been burned, the loss had been paid, and the policy which covered it was dead. It could not be effectively renewed, and, if renewed in form, would be lifeless and worthless in fact. So that, beyond defeating the plaintiff's claim, the defendant had no right which at all needed a further affirmative judgment, and no such judgment could be even a practical possibility.

That fact is an insuperable difficulty in the way of regarding this plea as a counterclaim. To be such it must amount to an independent cause of action which the defendant company, if it had not been sued, might have enforced as plaintiff. Assume, therefore, that this suit had not been brought, but that the company had sued in equity upon the pleaded facts to reform the policy. There would have been no equitable cause of action, because the remedy at law would be adequate, and no necessity or ground for equitable interference would be disclosed. The company could show no right dependent upon an affirmative renewal of the old policy, for that was already paid and canceled, and could not be renewed, and would be wholly nugatory and worthless if its formal existence should be prolonged. The only possible relief would be to cancel and extinguish the second policy, issued by mistake. But a defense against that at law, as never having been a contract made, as having no legal existence, would be always available against any possible claimant, and no ground for the intervention of equity would appear. The case would be like *Geer v. Kissam*, 3 Edw. Ch. 129, in which the equitable relief sought was the cancellation of an overdue note, and in which it was

held that the action could not be maintained. The defense at law was perfect and fully adequate. Equally so it would be perfect in the case I am supposing, and not only so, but the equitable remedy of a reformation would be both superfluous and impossible; superfluous, because needless for any purpose, and impossible, since the contract as reformed had already been finally executed. The policy existing by mistake could not be valid in any hands. By the fire it had matured, and ceased to be a continuing liability under which new rights could accrue. It represented only an existing right of action at law, and was altogether open to the defense that the policy was a mistake, and not a contract for the added insurance claimed.[1]

* * * * * * * * * *

[1] "The counter-claim is an independent and distinct cause of action, and must be alleged as fully in form and substance, and capable of proof in the same manner, as if it was a complaint." Rumbough v. Young (1896), 119 N. C. 568.

SHELTON v. CONANT.

Supreme Court of Washington. 1894.

10 Washington, 193.

The opinion of the court was delivered by

STILES, J.: This action was commenced September 19, 1892, for the foreclosure of a chattel mortgage. More than a year later the defendant filed an answer, which alleged that on or about October 12, 1889, the plaintiff sold and agreed to deliver at once to the defendant certain personal property (described) of the reasonable value of $383; and that plaintiff had failed to deliver said personal property, though often requested by defendant so to do, to defendant's damage in the sum of $383.

* * * * * * * * * * *

But the respondent also urges that the counterclaim set up was not one of those admissible under the statute. * * * The fact that the subject of the pleading was unliquidated damages is not an objection sufficient to bar the demand as a counterclaim to the cause of action stated in

the complaint. The second subdivision of Code Prac. § 195, especially provides for a counterclaim, in an action arising on contract, of any other cause of action arising also on contract. There has been more or less controversy as to whether unliquidated damages arising upon, and because of the failure of the plaintiff to carry out, another contract than the one upon which he sues, can be recovered in this manner, but we think the rule is now well settled in all jurisdictions which have code provisions such as our own. Pom. Code Rem. (3d Ed.) § 798; Bliss, Code Pl. §§ 378-382. *Niver v. Nash*, 7 Wash. 558, 35 Pac. 380, held nothing to the contrary.[1]

* * * * * * * * * * *

[1] To the same effect see Michigan Stove Co. v. Pueblo Hardware Co. (1911), 51 Colo. 160.

The common-law rule is stated as follows in Waterman on Set-Off, § 302: "An unliquidated demand cannot be set off; even though secured by a penalty; neither at law nor in equity; unless there is some understanding between the parties, express or implied, under which the defense may be let in; or some special case made, such as insolvency, non-residence of the plaintiff, etc."

STONER v. SWIFT.

Supreme Court of Indiana. 1905.

164 Indiana, 652.

MONKS, J. Appellant brought this action against appellees to recover for wheat sold and delivered to them. The complaint was in two paragraphs, the first being a common count to recover the balance due on 324 bushels of wheat; and the second set up a special contract for the sale of 324 bushels of wheat at $1.02 per bushel, alleging a breach of said contract, and demanding judgment. Appellees answered by general denial, and filed a counterclaim. The counterclaim alleged a special contract for the sale by appellant of 600 bushels of wheat at $1.02 per bushel, upon which $164.64 had been paid, and that only 328 bushels and 25 pounds had been delivered; that, by reason of the failure of appellant to deliver the remaining 272 bushels and 35 pounds, appellees had been damaged $157.52, which, with

the sum of $164.64 paid, amounted to $322.15. Judgment demanded for so much as the court may find due for a breach of said contract. A trial of said cause by the court resulted in a finding and judgment in favor of appellant for $11.86.

It is insisted by appellant that appellees' counterclaim was insufficient, because the readiness of appellees to perform their part of the contract sued upon therein (that is, to pay for said wheat on delivery) is not shown by direct allegation or otherwise. Citing *Magic, etc. Co. v. Stone, etc. Co.*, 158 Ind. 538, 541, 542, and cases cited; *Beard v. Sloan*, 30 Ind. 279; *Smith v. Smith*, 8 Blackf. 208.

Section 353, Burns' Ann. St. 1901, provides: "A counterclaim is any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages."

A pleading cannot perform the office of both an answer and a counterclaim. *The Indiana, etc. Association, No. 2, v. Crawley*, 151 Ind. 413, 417, 418; *Bird v. St. John's. etc. Church*, 154 Ind. 138, 149; *Hadley v. Prather*, 64 Ind. 137, 139; *Douthitt v. Smith*, 69 Ind. 463, 467; *Blakely v. Boruff*, 71 Ind. 93, 96, 97.

It was said by this court in *Bird v. St. John's, etc. Church*, 154 Ind. 149: "The distinction between an answer and a counterclaim or set-off is an obvious one. The purpose of an answer is to defeat the action and bar recovery. A counterclaim or set-off, on the contrary, is a pleading by which the defendant states a cause of action in his own favor, and against the plaintiff. It does not purport to answer the complaint, or to set forth any facts which bar a recovery upon it. It has none of the properties of an answer. It neither admits nor denies the allegations of the complaint. It does not confess and avoid them. Where a defendant succeeds upon an answer going to the whole complaint, the only judgment the court can pronounce is that the plaintiff can take nothing by his complaint, that the defendant go hence thereof without day, and, by virtue of the statute, that the defendant recover his costs. If a defendant wishes to obtain affirmative relief against the plaintiff he must state his cause of action by way of counterclaim or set-off. It is settled beyond dispute that the same pleading cannot be treated both as an answer and as a counterclaim."

It is provided in section 350, Burns' Ann. St. 1901 (section 347, Rev. St. 1881), that set-off and counterclaim may be pleaded as answers, but, to be sufficient, they must allege facts sufficient to constitute a cause of action against the plaintiff. *Blue v. Capital National Bank,* 145 Ind. 518, 520, and cases cited; *Indiana, etc. Association, No. 2 v. Crawley,* 151 Ind. 413, 417; *Branham v. Johnson,* 62 Ind. 259, 263; *Flanagan v. Reitemier,* 26 Ind. App. 243, 247; 1 Works, Prac. & Pleading (3d Ed.) § 665, and cases cited.

Appellees contend that their counterclaim was only an answer, and belongs to the second class mentioned in *Campbell v. Routt,* 42 Ind. 410, 413, and that for this reason the rule of pleading urged by appellant does not apply. The part of the opinion in *Campbell v. Routt, supra,* cited by appellees, reads as follows: "As thus defined, counterclaims may be divided into two classes, though in both they must arise out of, or connected with, the cause of action, viz.: (1) Such as are based upon matters that may be the subject of an action in favor of the defendant against the plaintiff; (2) such as embrace matters that go merely to mitigation of damages."

Even if the classification of counterclaims made in *Campbell v. Routt, supra,* can be maintained—a question we need not and do not decide (see, however, 1 Works, Prac. & Pleading, § 665, and cases cited)—yet, as appellees' counterclaim alleges facts as the foundation of a claim in favor of appellees against appellant, and demands judgment in the court below, it clearly belongs to the first and not to the second class mentioned in said opinion, concerning which it was said on page 416, "Such a counterclaim must state facts sufficient to constitute a cause of action in favor of the defendant and against the plaintiff, or it will be subject to a demurrer."

It is evident that the court erred in overruling appellant's demurrer to the counterclaim.

Judgment reversed, with instructions to sustain the demurrer to the counterclaim, and for further proceedings not inconsistent with this opinion.[1]

[1] The statute reads as follows "Sec. 350. A counter-claim is any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages."

Works, in the section here cited, says: "In the case of Campbell v. Routt,

a distinction was drawn between counter claims arising under these two branches of the statutory definition, by treating the one as a cause of action on the part of the defendant, and the other merely as a defense. * * * It is doubtful if this division of the definition of a counter-claim and the distinction made can be sustained. Certainly it is not regarded in practice, and in later cases no such distinction is made, but all matters of counter-claim are treated as causes of action, and the pleading as a complaint, which must, to be sufficient on demurrer, show a cause of action in favor of the defendant."

Mr. Pomeroy, in his authoritative work on Code Remedies, 3rd Ed., § 629, says: "It is an essential element in the legal notion of a counter-claim that it must be a *cause of action;* must consist of a right to some affirmative relief, and not be matter simply defensive, either in bar of the plaintiff's recovery, or in reduction of its amount."

NATIONAL FIRE INSURANCE COMPANY v. McKAY.

Court of Appeals of New York. 1860.

21 New York, 191.

Appeal from the Supreme Court. Action to foreclose a mortgage, made by Joseph W. Savage to the plaintiff. The defendant, McKay, by his answer set up this state of facts: In June, 1847, the plaintiff, in consideration of $10,000, conveyed the premises in question to one, Savage, by deed with covenants of seizin, quiet possession, against incumbrances, and for further assurance, and with a covenant of general warranty. Savage paid $2,000, part of the purchase money, and executed a bond and mortgage in question to secure the balance. McKay was jointly interested with Savage in the purchase and in the covenants, and the deed was made to Savage for the joint benefit of Savage and McKay, as was known to the plaintiff. A few days after the conveyance by the plaintiff, Savage, in consideration of $5,000, conveyed to McKay the undivided half of the premises, with covenants of seizin, quiet possession, and warranty, and McKay assumed to pay one-half of the mortgage to the plaintiff. In 1849, Savage, in consideration of $2,350, conveyed to McKay the other undivided half with like covenants; at the same time Savage executed to McKay an assignment of the covenants of the plaintiff on the ground that they were personal covenants, and did not run with the land; and McKay agreed to discharge Savage from all liability in regard to the title. By virtue of these conveyances McKay went into possession and paid $3,000 of the

remainder of the purchase money, leaving $5,000 unpaid. The defendant further set up, that the premises were not free and unincumbered of charges, taxes, etc., at the time of the conveyance, but were unincumbered by certain taxes lawfully assessed by and for Erie county, which were a lien and incumbrance on the premises. They were sold by comptroller according to law for the taxes, and conveyed to Roswell Steele, the purchaser. James Bennett, McKay's tenant, was evicted by due legal proceedings founded on the title thus acquired by Steele, of which the plaintiff had notice. The same facts are set up by way of further answer; a breach of the covenant of warranty is formally alleged, and damage averred, viz.: loss of premises, purchase money and costs of ejectment suit, and the answer concludes with a prayer that the defendant, McKay, recover damages of the plaintiff. In the complaint judgment was claimed only against Savage for any deficiency that might remain unpaid after the sale; and the defendant, McKay, was notified in writing at the time of the service on him of the summons, that the plaintiff made no personal claim against any of the defendants except Savage.

* * * On the trial before a referee, McKay offered to prove the facts set up in his answer. The evidence was rejected, on the ground that he could not avail himself of such facts either as a defense or by way of counterclaim. * * *

COMSTOCK, Ch. J. * * *

The appellant's answer, the truth of which he offered to prove, shows that he is the assignee of all the covenants contained in the conveyance against incumbrances and for quiet enjoyment. These were broken, he insists, by the eviction at the suit of Steele under the tax title, and he claims that the facts constitute a counterclaim which should have been tried and determined in his favor. But I think this point is not well taken. A counterclaim must be one "existing in favor of a defendant, and against a plaintiff between whom a several judgment might be had in the action." Upon McKay's own statement which he offered to verify, I do not see that anything was in litigation between him and the plaintiffs, or that any judgment could be rendered against him except one for costs for interposing a groundless defense to the suit. According to the answer no cause of action existed against him. The complaint

claimed nothing against him personally, and stated no facts as the foundation of such a decree. The answer showed that he had no title or interest in the mortgaged premises to be affected by the decree. His defense, therefore, must be deemed to have been put in for the mere purpose of establishing a legal cause for an independent suit on the plaintiffs' covenants, without any demand against himself being at all involved in the controversy. Without undertaking at this time to expound the provisions of the code which relate to counterclaim, I am satisfied they do not apply to such a case as this. Of course the claim could only be enforced in this case by a judgment in the appellant's favor for the damages sustained in consequence of the eviction. But the plaintiffs might, notwithstanding such a judgment be entitled to the decree for the foreclosure and sale which they have obtained. The alleged counterclaim does not impair or affect the right to that relief. I apprehend that a counterclaim, when established, must in some way qualify or must defeat the judgment to which a plaintiff is otherwise entitled. In a foreclosure suit a defendant who is personally liable for the debt, or whose land is bound by the lien, may probably introduce an offset to reduce or extinguish the claim. But where his personal liability is not in question, and where he disclaims all interest in the mortgaged premises, I do not see how he can demand a judgment against the plaintiff on a note, a bond, or a covenant. Such is virtually this case. The appellant has, as he insists, a cause of action against the plaintiffs upon a broken covenant, but that cause of action, if it exists, does not enable him to resist or modify the relief to which the plaintiffs are entitled. I think the judgment should be affirmed.

CLERKE, J., also delivered an opinion in favor of affirmance, and all the judges concurred.

Judgment affirmed.[1]

[1] *Accord.* Peterson v. Bean (1900), 22 Utah, 43; Stolze v. Torrison (1903), 118 Wis. 315; Appleton Mfg. Co. v. Fox River Paper Co. (1901), 111 Wis. 465.

The rule is sometimes prescribed by statute. See statutes pp. 356-364, *supra*.

(b) How Pleaded.

BABCOCK v. MAXWELL.

Supreme Court of Montana. 1898.

21 Montana, 507.

PIGOTT, J. * * *

* * * * * * * * * * *

There is a further and controlling reason why the alleged new matter set up in the answer should not be treated as a counterclaim: It is denominated an "equitable defense," and does not purport to be a counterclaim. Defendant, having characterized his pleading as a defense, is bound by the choice he makes, and may not afterwards be heard to assert that it is a counterclaim. 22 Am. & Enc. Law, 423, and cases there cited. A counterclaim must be described as such where the question turns upon the want of a reply. "Such a rule is essential to protect a plaintiff from being misled by an answer, and to prevent the snare of a counterclaim lurking under the cover of a supposed defense, and unconsciously admitted by a failure to reply." *Baker v. Hotchkiss,* 97 N. Y., at page 408. See, also, Pom. Code Rem. § 748, note 1; Boone, Code Pl. § 101, and cases there cited in notes. This rule, which is supported by the decided weight of authority, is both simple and just. The defendant insists, however, that the decision in *Davis v. Davis,* 9 Mont. 267, 23 Pac. 715, is conclusive of the case at bar. In that case the only question necessary to be decided was whether an answer stated facts sufficient to constitute either a defense or a counterclaim; but, even if that decision is correct, it cannot control the determination of the question now presented, for the reason that in the Davis case no advantage was sought because of failure to reply, and for the more weighty reason that, under the statutes then in force, all averments of new matter in the answer, whether by way of defense or as constituting a counterclaim, not traversed or avoided by reply, were admitted to be true. Then the plaintiff knew that, by failing to reply, he admitted the truth of all the new matter alleged in the answer. Now he knows that the statement of new matter in

defense is deemed controverted or avoided, and that it is necessary to reply only when a counterclaim is set up. "In all the states but one or two, the plaintiff must reply to a counterclaim, or its averments of fact are admitted to be true. He ought not to be subject to this penalty unless he is told in the most express terms that the pleading is a counterclaim." Pom. Code Rem. § 748. In California, where no reply whatever is allowed, the allegations of new matter of defense and of counterclaim are deemed denied or confessed and avoided; and even there it is said that, "where matters which are proper matters of defense are pleaded as such, we are clear that they should be regarded only as such, notwithstanding a prayer for affirmative relief at the conclusion of the answer. The matters of the cause of complaint must be separately stated as a cause of action against the plaintiff, and not as a defense to the plaintiff's cause of action." *Doyle v. Franklin,* 40 Cal. 110; *Brannon v. Paty,* 58 Cal. 330; Carpenter v. Hewel, 67 Cal. 589, 8 Pac. 314.[1]

* * * * * * * * * *

[1] *Form of Counter-claim.* In Rylander v. Laursen (1902), 113 Wis. 461, the court said in regard to the manner of stating a counter-claim: "The technically correct way to plead a counter-claim under this statute is to commence that part of the answer which is supposed to set forth a counter-claim with the distinct statement that the allegations following are pleaded as a counter-claim. The form frequently used and which seems unobjectionable is, 'The defendant, by way of counter-claim, herein alleges.' But while this is doubtless the better way it cannot be said to be the only way."

A more liberal rule is adhered to by some courts. Thus, in City of Huron v. Meyers (1900), 13 S. D. 420, the court said: "Undoubtedly it is better practice, when a defendant intends to rely upon a counter-claim, to designate it as such in the pleading; but this is not indispensible. If the facts pleaded and the prayer of the answer show that it was the intention of the pleader to set up a counter-claim, and the facts are sufficient to constitute such counter-claim, then it will be so treated by the court, regardless of the fact that it is not designated as a counter-claim in the pleading."

(c) Kinds of Counterclaims.

(1) Arising Out of the Same Transaction.

ADAMS v. SCHWARTZ.

Appellate Division of the Supreme Court of New York. 1910.

137 New York Appellate Division, 230.

LAUGHLIN, J. The amended complaint contains two counts. The first is for false arrest and imprisonment and the second for malicious prosecution. Both causes of action relate to the same arrest and prosecution. It is alleged that on the 20th day of May, 1909, the defendant caused the arrest of the plaintiff by a police officer, without a warrant or other legal process and without probable or justifiable cause, "upon the false charge of having by disorderly conduct committed a breach of the peace, in that he had annoyed the defendant by posting theatrical posters or bills upon a billboard attached to the premises under leasehold belonging to defendant at the corner of Amsterdam avenue and Sixty-ninth street, in the borough of Manhattan, city of New York," and caused him to be taken to a police station and there made said charge against him, whereby the plaintiff was restrained of his liberty over night, and made the same charge before a magistrate the next day, but that on the hearing he was exonerated and discharged from custody. The amended answer put in issue the material allegations of the amended complaint, inclosing the arrest and prosecution of plaintiff by or at the instance of defendant. It then separately pleads with respect to each cause of action the advice of counsel in mitigation of damages, and certain facts as a separate, distinct and entire defense. These facts are, in substance, that defendant was the lessee of said premises; that on the day in question the plaintiff, without his consent and without the consent of the owner of the property, placed theatrical advertisements upon billboards attached to the wall of a building on the premises and on other portions of said wall; that defendant ordered the plaintiff off the premises, but he remained on and used threatening and abusive

language, "and was insulting in his behavior with intent to provoke a breach of the peace," by reason of which a breach of the peace might be and was caused; that plaintiff annoyed defendant and was in the act of committing a misdemeanor by posting the theatrical advertisements as aforesaid, and that thereupon a police officer "who witnessed the acts set forth herein arrested" the plaintiff. The defendant further pleaded with respect to each cause of action as "a further defense and by way of set-off and counterclaim" the same facts in substance, and elaborated thereon by stating that the plaintiff wrongfully entered upon the premises without permission or license from the defendant or the owner, to the defendant's damage in the sum of $50. The prayer for relief contained in the answer is that the complaint be dismissed, and that defendant have judgment on his counterclaim and for costs. The plaintiff in a single pleading separately demurs to each counterclaim upon the ground that it is not of the character specified in section 501 of the Code of Civil Procedure, in that it is not "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action." The most favorable inference that can be drawn in behalf of plaintiff from the facts pleaded is that the defendant caused his arrest while he was on premises of which defendant was the lessee and was in the act of posting threatrical advertisements on the walls of the building thereon; that defendant followed the arrest up and prosecuted the charge made against the plaintiff until it terminated favorably to the latter; and that the defendant claims that the plaintiff was guilty of disorderly conduct and was guilty of a misdemeanor, in that he entered upon the premises and posted the advertisements without the consent of the defendant or of the owner, and was also guilty of an unlawful trespass.

* * * * * * * * * * *

Section 500 of the Code of Civil Procedure authorizes the defendant to interpose an answer containing, among other things, "a statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition." Section 501, so far as material to the questions presented by the appeal, since the plaintiff's causes of action and the defendants' counter-

claim are based on torts, provides that the counterclaim must be a cause of action in favor of the defendant against the plaintiff "arising out of the contract or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." This provision was taken from subdivision 1 of section 646 of the Code of Procedure, as originally enacted, without change of phraseology.

The question is: Does the defendant's counterclaim arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or is it connected with the subject of the action It is not distinctly pleaded that the defendant caused the arrest of the plaintiff while the latter was in the act of committing the unlawful trespass, but, assuming that such is its effect, we are of opinion that the counterclaim is not authorized. The *transaction* set forth in the complaint as the foundation of the plaintiff's claim in one instance is *the arrest* and in the other *the acts* constituting the malicious prosecution. So likewise the subject of the action which has been defined in some cases to be the facts constituting the cause of action, and since the action is not on contract, that is doubtless what it would be here, and therefore it was the arrest and malicious prosecution which are personal torts or the material facts relating thereto. *Lehmair v. Griswold*, 40 N. Y. Super. Ct. 100; *Carpenter v. Manhattan Life Ins. Co.*, 93 N. Y. 552; *Rothschild v. Whitman et al*, 132 N. Y. 472. The tort set forth in the counterclaim is a trespass on real property. It may be that the material facts with respect to the trespass would necessarily be developed upon the trial of the action for false arrest and malicious prosecution, but the trespass is neither directly nor necessarily connected with the arrest or prosecution of the plaintiff, nor did it arise out of such arrest or prosecution. The rule is stated in the well-considered case of *Xenia Branch Bank v. Lee*, 7 Abb. Prac. 372, that this provision of the code was designed to prescribe a reciprocal rule, and that, where a counterclaim is properly pleaded, the cause of action to which it is pleaded might likewise be pleaded as a counterclaim if the defendant had brought the action. See, also, *Rothschild v. Whitman et al.*, 132 N. Y. 472; *Story v. Richardson*, 91 App. Div. 381. It seems to us that that test indicates quite clearly that this is not a proper counterclaim. If the defend-

ant sued the plaintiff for trespass, no rule of convenience would require that in the same action the court should investigate an arrest and prosecution of the defendant for the trespass on a counterclaim being interposed which denied the trespass and set up the arrest and malicious prosecution and demanded judgment therefor. This statutory provision of law regulating practice, which has been in force more than 60 years, has frequently been the subject of judicial construction. Thus far, however, no rule has been laid down in its construction by which it can readily be decided in all cases whether or not a given counterclaim is properly interposed and as might naturally be expected it would be difficult to harmonize all of the decisions on that point. In *People v. Dennison et al.*, 84 N. Y. 272, which was an action for fraud in obtaining money from the state on false vouchers and collusion with officials under cover of a contract, it was held that a counterclaim for moneys due on the contract based on the same work was not proper because the subject of the action was the *fraud* which was wholly distinct from the claim that money was due under the contract. On the other hand, in *Ter Kuile v. Marshland,* 81 Hun, 420, it was held that a counterclaim for moneys due under a contract of agency was proper in an action against the agent for conversion of moneys collected, and in *Thomson* v. *Sanders*, 113 N. Y. 252, which was an action on a bond, it was held that a counterclaim for damages sustained by the defendant through fraudulent representations of the plaintiff in inducing him to execute the bond was proper, on the theory that it arose out of the same transaction, although it was based upon an affirmance of the bond, and there was no tender back of the consideration received or prayer for rescission. In *Bernheimer v. Hartmayer,* 50 App. Div. 316, it was held that a counterclaim for the storage of property sought to be replevied in the action was not proper. In *Sheehan v. Pierce,* 70 Hun, 22, which was an action for slander, it was held that a counterclaim for a similar slander uttered by the plaintiff against the defendant at the same interview was not proper. The theory of that decision was that, if there were slanderous utterances by each of the parties, they were necessarily separate and disconnected, and each afforded a cause of action the moment it was uttered. It had been held by the same court in *Heigle v.*

Willis, 50 Hun, 588, that in an action to recover damages resulting from a collision between the respective vehicles in which the plaintiff and defendant were riding a counterclaim based on the alleged negligence of the plaintiff in causing the collision was proper, upon the theory that the collision was the transaction, and that the parties differed merely as to who was responsible for it, and that as the facts would be developed upon the trial that question would be determined in favor of the plaintiff or of the defendant. In *Xenia Brach Bank v. Lee, supra,* which was an action for the conversion of notes, a counterclaim against the plaintiff as indorser of the notes was sustained upon the ground that the transaction embraced the history of the notes, or, at least, the connection of the respective parties therewith and the circumstances under which the defendant received the same, and that one or the other only could recover, depending upon the facts relating to the transaction.

In *Carpenter v. Manhattan Life Ins. Co.,* 93, N. Y. 552, which was an action by a first mortgagee against a second mortgagee, who was in possession, to recover for the conversion of cord wood, defendant admitted taking the wood, but denied plaintiff's ownership, and interposed a counterclaim to the effect that the security of his mortgage was impaired by plaintiff by unlawfully cutting the timber. The court in sustaining the counterclaim said, among other things: "The counterclaim must have such a relation to and connection with the subject of the action that it will be just and equitable that the controversy between the parties as to the matters alleged in the complaint and in the counterclaim should be settled in one action by one litigation; and that the claim of the one should be offset, or applied upon the claim of the other. * * * Here it is sufficiently accurate to say that the subject of the action was the wood wrongfully taken by the defendant, and the counterclaim was for damages sustained by the defendant, in the wrongful impairment of its security, by the severance of the same wood from the land, and thus diminishing the value of the land by the value of the wood. In such case it is certainly just that the defendant should counterclaim its damages for the severance of the wood against the plaintiff's claim for the conversion thereof. In the form of conscience the plaintiff was under obligation to restore the wood to the defendant as a portion of its security

for its claim against the mortgagor. Thus it can with great propriety be said that the defendant's claim had some connection with the subject of the action."

It is now well settled that, in an action either on contract or on tort, a counterclaim may be interposed based upon either contract or tort, provided it answers the other requirements of sections 501 and 502 of the Code of Civil Procedure, namely, that it arises out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or is connected with the subject of the action, or, if the action be on contract, any other cause of action arising on contract and existing at the time the action was commenced. *Deagan v. Weeks,* 67 App. Div. 410; *Rothschild v. Whitman et al., supra; Ter Kuile v. Marsland, supra,* and *Thomson v. Sanders, supra.* If the facts necessary to the proof of either cause of action involve an inquiry concerning the same transaction or matter, that is regarded by many of the authorities as a material consideration, but it is not controlling unless from the nature of the counterclaim it may fairly be said that it arises out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or is necessarily or directly connected with the subject of the action. *Story v. Richardson,* 91 App. Div. 381, 843, affirmed 181 N. Y. 584; *Van v. Madden,* 132 App. Div. 535; *Deagan v. Weeks, supra; Rothschild v. Whitman et al., supra.* In *Story v. Richardson, supra,* the action was on a promissory note given by defendant as the purchase price of stock, and it was held that a counterclaim for damages for false representations made by plaintiff in inducing defendant to loan money to the corporation, even though the same representations induced the purchase of the stock, was not proper, as the transaction upon which the counterclaim was based was the loan of the money to the crporation, and that it was not connected with, and did not arise out of, the notes.

Applying that reasoning here, it would seem that the transaction out of which the counterclaim arises was the trespass, and that it was not necessarily connected with the arrest but doubtless preceded it, and was not caused thereby. Moreover, the arrest and malicious prosecution were not caused by the trespass in any true sense of cause and effect. The arrest and malicious prosecution are alleged

to have been caused by the voluntary act of the defendant. In *Van v. Madden, supra,* it was held that a counterclaim for failure on the part of the vendor under a conditional sale to retain the property for the statutory period and sell it as provided by law after it had been returned at his request was not proper in an action by the vendor for the conversion of part and for unlawful injury to the balance of the property. This decision went upon the theory that the transaction of which the plaintiff complained and the subject of the action were the conversion and trespass, and that the counterclaim had no connection with the former and only a remote connection with the latter. In *Deagan v. Weeks, supra,* the court, sustaining a counterclaim for assault and battery committed at the same time and place as the assault and battery of which the plaintiff complained, through Judge CHASE, say: "The sections of the code relating to counterclaims should have a liberal construction, and where alleged causes of action, one set forth in the complaint and the other in the defendant's answer as a counterclaim, are so connected that they must be determined on the same evidence, they should be litigated and determined in one action, although a recovery cannot be had in favor of either defendant or plaintiff without a finding that wholly defeats the alleged cause of action of the other. It does not seem to us in accordance with the spirit of modern procedure to give the sections of the code quoted such a technical construction that it might require the trial court to twice sit and hear exactly the same facts in actions between the same parties before the proper judgment can be rendered between them. We have not overlooked the fact that there are decisions in this and other states seemingly in conflict with the views herein expressed."

The cases of *Sheehan v. Pierce, supra,* and *Deagan v. Weeks, supra,* are reconcilable and consistent upon the theory that in the former the court meant to decide that where two causes of action for slander co-existed, one in favor of the plaintiff and the other in favor of the defendant, the one could not be counterclaimed against the other, even though the two slanderous utterances were in the same conversation, and that the effect of the decision in the latter is merely that where the transaction, namely, the encounter or affray upon which the plaintiff bases his cause of action for assault, instead of constituting an assault upon

the plaintiff, in fact constituted an assault by him upon the defendant, so that there is but a single cause of action in favor of one, but not in favor of both of the parties, either may interpose a counterclaim based upon his view of the facts in an action brought by the other, which is analogous to the case of the collision between two vehicles.

The case of *Deagan v. Weeks, supra,* however, which carries the doctrine further than any other authority, does not go far enough to sustain the counterclaim in the case at bar. In the case at bar the defendant denies that he caused the arrest of the plaintiff, and avers that the arrest was made by a police officer who was an eyewitness to the transaction. If the police officer made the arrest on his own responsibility, then the defendant is in no manner connected therewith, and, so far as he is concerned, it is the same as if no arrest had been made. The case, therefore, is virtually the same as if the defendant took the position that there had been no arrest at all, and on that theory, instead of there being a transaction such as is alleged in the complaint resulting in the arrest of the plaintiff, the things he has attempted to allege being without foundation, it would appear that there was no transaction at all in the nature of an arrest or malicious prosecution. The defendant cannot deny the existence of the transaction upon which the plaintiff founds his cause of action for a tort, or that there was any subject of the plaintiff's action, and at the same time interpose a counterclaim for trespass which was another transaction, upon the theory that it arose out of or was connected with an arrest or malicious prosecution, which never took place. Of course, where there has been a transaction of the nature of that set forth in the complaint, and that transaction gives rise to a cause of action in favor of one or the other of the parties, the same rule might obtain in some instances where it gives rise to a cause of action in favor of both, and they differ with respect to the attendant and surrounding facts and circumstances and the result or effect of the transaction, then a counterclaim may properly be interposed. The trespass, however, was a separate and independent transaction in no manner connected with the arrest excepting that the defendant points to the trespass as the reason the police officer made the arrest. That, however, was not the necessary consequence of the trespass, and

defendant on his theory of the case was not moved by the trespass to do anything. It could hardly be contended that the counterclaim would be proper if the arrest had not been made while the plaintiff was in the act of committing the trespass. Therefore no important principal is involved in the question presented for decision, for, since manifestly the counterclaim could not be interposed if it appeared that the defendant ordered the arrest of the plaintiff or swore out a warrant for his arrest a year, a month, or even a day after the unlawful trespass, no great convenience would be subserved by holding that the counterclaim will lie in the single instance, where it appears that the arrest was made and the malicious prosecution was instituted concurrently with the trespass. The learned special term overruling the demurrer distinguished the case of *Rothschild v. Whitman et al., supra,* on the facts. That decision was clearly distinguishable on the facts. It was an action for false arrest and malicious prosecution based upon the arrest of the plaintiff under an order of arrest in a civil action for fraud and deceit alleged to have been practiced some nine months before. A counterclaim for the fraud and deceit was interposed. The court in holding that the counterclaim was not proper dwelt at length upon the interval of time intervening between the fraud and deceit and the arrest, and apparently placed great emphasis on the fact that the one tort was committed in January and the other in September from which it might be inferred that the decision would have been otherwise had the two torts been committed simultaneously.

We are of opinion, however, that it does not follow that the court would have sustained the counterclaim had the torts been committed concurrently. On the contrary, it is stated in the opinion that, although the deceit was the inducement to the action and arrest, it preceded both, and arose out of neither, but existed independently of them, and was not the cause of either, "but was rather the pretext or ostensible reason"; that the malicious prosecution was "caused by the act of commencing the action, not by the reasons given for commencing it—an illegal arrest, such as that in question, is caused by the issuing and service of the order of arrest, not by the facts recited therein. There is no relation of cause and effect between an illegal act, or the determination to do one, and the excuse alleged for

doing it. We think that the claim and counterclaim did not arise out of the same transaction, and that the plaintiff's claim rests upon an entirely different foundation from the defendants' counterclaim. Each was a separate and distinct wrong and a transaction by itself." In the light of these authorities it seems quite clear that the trespass for which the defendant interposed the counterclaim did not arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claims, and that it is not connected with the subject of the action set forth therein.

It follows, therefore, that the interlocutory judgment should be reversed, with costs, and the demurrer sustained, with costs, but with leave to the defendant to answer over by omitting the counterclaim upon payment of the costs of the appeal and of the demurrer.[1]

INGRAHAM, P. J., CLARKE, SCOTT and MILLER, JJ., concur.

[1] Compare McArthur v. Moffet (1910), 143 Wis. 564, set out in the text *supra*, p. 199, where the meaning of the term "Transaction" is discussed.

---

(2) Connected With the Subject of the Action.

WILD RICE LUMBER COMPANY v. BENSON.

Supreme Court of Minnesota. 1911.

114 Minnesota, 92.

BROWN, J.: The complaint in this action alleges that in the year 1906 plaintiff purchased of the United States government large quantities of timber land situated in Clearwater county, this state; that at the time of said purchase the government was the owner of all land embraced within the township in which the land so purchased was located, and that in addition to selling and conveying to plaintiff said land the government granted and conveyed to plaintiff the right to construct and maintain such logging roads over its other land in said township as plaintiff might reasonably require for the purpose of conveying its timber to market; that in pursuance of this grant plain-

tiff constructed a certain logging road upon and across land then owned by the government, over which to convey and haul its logs to market; that it has maintained the road so constructed for the period of 13 years; that in the winter of 1910 defendants wrongfully and unlawfully obstructed and destroyed a part of said road, to plaintiff's damage in the sum of $600. It also alleges that defendants threaten to continue their obstruction of said road and to interfere with plaintiff's use thereof, and will do so unless restrained by the court. The prayer of judgment is that defendant be restrained and enjoined from obstructing the road and from interfering with plaintiff's use thereof, and that it have judgment against defendants for $600 damages alleged to have been suffered by reason of their alleged wrongful conduct.

Defendants answered separately, and interposed in defense (1) a general denial of all the allegations of the complaint, and (2) two separate counterclaims for damages for the alleged wrongful acts of plaintiff in entering upon the land belonging to them and constructing thereon the logging road in question. In support of the counterclaims defendants allege that since April 10, 1906, they have been and now are the owners of the land described in their answer, and over and across which the logging road was in part constructed by plaintiff; that in the month of October, 1909, plaintiff wrongfully entered upon said land without authority, and, knowing that it had no right to do so, constructed its logging road thereon, and thereby damaged and destroyed a meadow situated thereon, and otherwise injured the property; and, further, that plaintiff thereafter operated upon the road a "ponderous locomotive," and negligently permitted steam and smoke to escape therefrom in a "noisy and uproarious manner," thereby frightening defendants' horses and cattle, and rendering the premises unsafe, whereon defendant might "follow his occupation in the peaceful pursuits of agriculture and farming," to his damage in the sum of $6,000. The two counterclaims allege substantially the same facts.

Plaintiff interposed a demurrer to the answer, upon the ground that the counterclaims therein set up "are not proper subjects of counterclaims in this action." The demurrer was overruled, and plaintiff appealed.

Section 4131, Rev. Laws 1905, provides that a counter-

claim must be an existing cause of action in favor of defendant and against plaintiff, and, so far as here material, arise out of the contract or transaction made the basis of the complaint, as the foundation of plaintiff's claim, or be "connected with the subject of the action." While the phrase "connected with the subject of the action" is somewhat indefinite and ambiguous, it has always been given a liberal construction, to the end that litigation may be concentrated, and not driven to a multiplicity of suits. 2 Dunnell's Digest, 7608. The subject-matter of this action is the asserted right of plaintiff to occupy defendants' land with its logging road. If it possesses the right, defendants' counterclaim must fail. If it has not the right, it has trespassed upon defendants' property by the construction of the road, and is liable to them in damages.

The subject-matter of the action being the asserted right of each party to the exclusive possession of the land over which the road extends, a claim to recover damages for the wrongful interference with defendants' right of possession is connected with the subject of the action, and properly pleaded as a counterclaim. *Goebel v. Hough,* 26 Minn. 252, 2 N. W. 847; *Telulah v. Patten,* 132 Wis. 425, 112 N. W. 522. It will be noticed in the case at bar, however, that the counterclaims each contain two distinct items of damage, and are not separately stated: (1) Injury and damage to the land by the construction of the road; and (2) injury suffered in consequence of the negligent operation of the locomotive. We hold that the first is a proper counterclaim, but that the second—negligence in the operation of the locomotive—is not, properly speaking, connected with the subject of the action, and evidence thereunder should be excluded on the trial.

The demurrer goes to the whole pleading, and, inasmuch as it in part states a proper counterclaim, it was properly overruled.

Order affirmed.[1]

[1] Compare McArthur v. Moffet (1910), 143 Wis. 564, set out in the text *supra,* p. 199, where the meaning of the term "Subject of Action" is considered at length.

(3) In an Action on Contract, any Other on Contract.

JANSEN v. DOLAN.

St. Louis Court of Appeals. 1911.

157 Missouri Appeal, 32.

NORTONI, J.: This is a suit on an account. Defendant interposed a counterclaim. The finding and judgment, besides being for plaintiff on the account, was for defendant on the counterclaim as well, and from this judgment plaintiff prosecutes the appeal.

There is no controversy about the matter of the account sued upon, and the question for decision relates alone to defendant's right of recovery on the counterclaim interposed by her. It is argued the counterclaim sounds in tort and is therefor not a competent matter of consideration for the reason it does not assert a cause of action arising out of the contract or transaction set forth in plaintiff's complaint, nor is it connected with the subject of the action.

It is true the matter set forth in the counterclaim does not arise out of the contract or transactions set forth in the petition, and it is true, too, that it is not connected with the subject of the action, but it is entirely clear a portion of it is competent matter of counterclaim under the second subdivision of the statute (section 1807, R. S. 1909), for, though a tort appears, plaintiff might waive it and sue in assumpsit on the implied undertaking to pay.

Plaintiff sued defendant before a justice of the peace, as above stated, on an account. By way of answer thereto, defendant interposed her counterclaim for plaintiff's having deprived her of the use of a one-horse stake wagon and one set of harness, which it is averred she owned at the time from September 4, 1908, to January 26, 1909, excepting Sundays and holidays, the reasonable value of which is alleged to be $1 per day. On account of this defendant asks a recovery against plaintiff in the total sum of $113 at the rate of $1 per day for the time he retained the stake wagon and set of harness against her consent.

Though in cases such as this a pleading is required on behalf of defendant even where the cause originates before

a justice of the peace, it is not essential that such pleading should be highly formal. In other words, it is sufficient if the pleading affords reasonable notice to the adverse party of the claim asserted therein, together with its nature and character, and will operate as a bar to another action between the same parties on account of the same subject-matter. The second subdivision of our statute authorizing a counterclaim provides that in an action arising on contract any other cause of action arising also on contract and existing at the commencement of the action may be pleaded and considered as a counterclaim. Section 1807, R. S. 1909. This provision of the statute is liberally construed in aid of adjusting available matters of controversy in one litigation between the parties.

The counterclaim shows on its face that the cause of action declared upon therein arose from the tort of plaintiff in withholding possession of defendant's one-horse stake wagon and set of harness against her consent; but it reveals, too, that she waived the tort of conversion and elected to sue as in assumpsit for the reasonable value and use at $1 per day from September 4, 1908, to January 26, 1909, excepting Sundays and holidays, in the total sum of $113 as on an account of 113 separate items consisting each of compensation for a different day.

There can be no doubt that in many instances it is competent for a party to waive the tort and sue in assumpsit for the reasonable value of the article or thing or the use thereof of which defendant by his wrongful act has deprived him and appropriated its benefits to himself. That it was competent for defendant to waive the tort and her right to sue therefor in conversion in the present instance, and instead claim the reasonable value of the use of the wagon and harness during the time defendant retained it, is not to be questioned. Where such right of election obtains and the suit is in contract, the law is well-nigh universal to the effect that one may, under the second subdivision of the statute, set forth a counterclaim as also arising on contract, though it originated in the tortious act of plaintiff, if the tort is waived and an implied contract declared upon, provided a right of recovery therefor existed at the commencement of the action. Mr. Pomeroy, in his work on Code Remedies (4th Ed. § 677) says: "It may be regarded as a doctrine established by the overwhelming weight of author-

ity that whenever, by the principles of law, independent of the new procedure, a cause of action may be treated as arising either from tort or on contract, and the party holding the right may elect between the two kinds of remedial proceeding, and does in fact elect to sue on contract, the demand thus determined to be upon contract may be counterclaimed against a plaintiff's cause of action arising on another contract, or, when itself set up by a plaintiff, it may be opposed by a counterclaim arising out of another contract." See, also, *Barnes v. McMullins,* 78 Mo. 260, 274; *Starr Cash Car Co. v. Reinhardt,* 2 Misc. Rep. 116, 872; *Norden v. Jones,* 33 Wis. 600, 14 Am. Rep. 782; *Challiss v. Wylie,* 35 Kan. 506. Besides the counterclaim sufficiently revealing on its face that defendant elected to waive the tort and sue in assumpsit as on an implied undertaking, the proof made of her claim thereunder goes to that effect as well. It appears plaintiff, who had possession of defendant's stake wagon and harness, refused to surrender it to her on demand made September 4, 1908, and retained it until January 26, 1909. There is evidence in the record, too, tending to prove plaintiff used the wagon, broke it under a heavy load, and caused it to be repaired; but no claim is made for the breakage. Defendant might have sued in conversion for the value of both wagon and harness, but instead elected to proceed in assumpsit on the implied undertaking to make compensation for the reasonable value for the use.

The jury awarded defendant a recovery on the counterclaim for $113, the whole amount sued for. A considerable portion of this is unauthorized under the statute on counterclaims, for by its express provision no recovery can be had except on a demand existing at the commencement of the action. Section 1607, R. S. 1909. The present action was instituted by plaintiff November 17, 1908, and the first item of the counterclaim is of date September 4, 1908. So much of the counterclaim as accrued between September 4, 1908, and November 17, 1908, the time the suit was filed, is available to defendant.

But that portion of it consisting of items from November 17, 1908, to January 26, 1909, inclusive, may not be allowed, and the court erred in submitting it to the jury under instructions given. For this reason, the judgment should be reversed ,and the cause remanded.

It appearing defendant made a charge of $1 per day, excepting Sundays and holidays, from September 4, 1908, to January 26, 1909, and that the jury allowed her the entire sum, the cause is one where remittitur may be ordered and so much of the recovery as is competent apportioned with accuracy. But defendant may prefer to prosecute the entire claim in a separate action, and for this reason an opportunity to do so should be given. The judgment should be reversed, and the cause remanded, with directions to the trial court to enter judgment on the counterclaim as above indicated for $52, or permit defendant to dismiss as to it and proceed in a separate suit thereon as she may be advised in the premises. It is so ordered.[1]

REYNOLDS, P. J., and CAULFIELD, J., concur.

[1] *Presumption.* "Even if, upon the facts alleged, a cause of action in tort might be read into the pleading, every intendment is in favor of construing the counter-claims as being in contract." Goodwin v. Griffin, 88 N. Y. 639; Carroll v. Sharp (1910), 67 Misc. (N. Y.) 254.

ROOKER v. BRUCE.

Appellate Court of Indiana. 1909.

45 Indiana Appellate, 57.

RABB, J.: Appellant brings this action to recover attorney's fees, claimed to be due him under a contract averred to have been entered into between the parties. Appellee filed a counterclaim, charging the appellant with negligence in the management and conduct of the litigation, for his services in conducting which he seeks a recovery. Appellant's motion to strike out this counterclaim and his demurrer thereto were each overruled, as were his objections to evidence offered to sustain the same, and these rulings present the only question for our determination.

It is the theory of the appellant that, negligence being a tort, damages arising therefrom cannot be made the subject-matter of a counterclaim or set-off to an action founded on contract. It is true that negligence is a tort, but it may also constitute a breach of contract in certain cases. A common carrier for instance binds himself to exercise due

care in the carriage of passengers and goods intrusted to him, and his failure to do so is not only a tort, but also a breach of his contract, and for such breach he may be sued at the election of the injured party, either in tort or on the contract. An attorney who undertakes to perform services for a client in the conduct of litigation impliedly contracts to exercise due care, skill, and knowledge of the law in the conduct of his client's business, and his negligence in that regard is a breach of his contract, and a proper subject for counterclaim in any action he may bring to recover for his professional services.

Judgment affirmed.

(*d*) *Parties to Counterclaims.*

WEEKS v. O'BRIEN

Appellate Division of the Supreme Court of New York. 1898.

25 New York Appellate Division, 206.

BARRETT, J.: The action is brought against the defendant, in his representative capacity as executor of Ellen O'Brien, deceased, to recover damages for breach of a building contract by his testatrix. The answer sets up a number of counterclaims founded upon judgments recovered by third parties against the plaintiff, which it is alleged were, before the commencement of this action, assigned to the defendant, as executor of Ellen O'Brien, deceased. These counterclaims were demurred to upon several grounds, one being that they do not state facts sufficient to constitute a cause of action.

We think this demurrer was well taken. A demurrer to a complaint or counterclaim upon the ground that the facts stated are not sufficient to constitute a cause of action is well taken, when such facts do not disclose an enforceable claim against the party demurring, in favor of the plaintiff or counterclaiming defendant. Here the counterclaims, as

alleged, show no enforceable claim against the plaintiff in favor of the estate of Ellen O'Brien, deceased.

The rule is well settled that, where an executor takes a chose in action as a new security for a debt or obligation due to his testator, he takes it in his representative capacity. Before the code the executor could sue upon such chose in action, either in his individual or representative name. Now, however, under sections 449 and 1814 of the Code of Civil Procedure, the action must be brought in his representative character. This is expressly required by section 1814, and section 449 provides that an action must be brought in the name of the real party in interest. As the chose in action, under such circumstances, belongs to the estate, the executor, as such, is the real party in interest This is well settled. *Thompson v. Whitmarsh,* 100 N. Y. 35. The converse is equally well settled. Thus, where the chose in action does not come to the executor through his representation of the deceased,—where, in fact, such chose in action is acquired by him under a contract which never existed in favor of the decedent,—he takes it individually, and not as executor. This was held in the case above cited, where the rule was extended even to a debt received by the executor upon the sale of property of the estate. FINCH, J., there said: "Where an executor or administrator sells on credit the property of the estate, and sues to recover the debt, he, as an individual, is the real party in interest; for the contract is made with him, and the promise to pay runs to him."

See, also, *Dudley v. Griswold,* 2 Bradf. (Sur.) 24, and *McClenahan v. Cotten,* 83 N. C. 332. It follows that an individual claim of the defendant is here attempted to be counterclaimed against a cause of action against his estate. This may not be done. Code, § 505. The defendant, in his representative capacity, has absolutely no interest in the counterclaims alleged. In such capacity, he is as much a stranger to them as though they had been held by some third party. As executor, he has no cause of action thereon.

It may be that this point might have been raised by a demurrer upon the ground that the counterclaims were not of the character specified in section 501 of the code, the particular nature of the variance being set forth. We think, however, that the method adopted was also a proper one.

The judgment overruling the demurrer should be reversed, and the demurrer sustained, with costs of the appeal and in the court below, and leave to the defendant to amend upon payment of such costs.

VAN BRUNT, P. J., RUMSEY, PATTERSON and O'BRIEN, JJ., concurred.

POPE MANUFACTURING COMPANY v. CHARLESTON CYCLE COMPANY.

Supreme Court of South Carolina. 1899.

55 South Carolina, 528.

July 18, 1899. The opinion of the court was delivered by Mr. Chief Justice MCIVER: The plaintiff brings this action, as a corporation, against the defendants, as co-partners in trade under the name and style of the Charleston Cycle Company, to recover the amount due on three accounts for goods sold and delivered and for work and labor done at the request of defendants, each of which accounts is set out in the complaint as a separate cause of action. The defendants, in their joint answer, set up as their defense a general denial of all the allegations in the complaint. The defendant E. B. Welch also filed a separate answer, in which he alleges that he alone was at the times mentioned, and still is, doing business under the name and style of the Charleston Cycle Company, and sets up two counterclaims against the plaintiff, upon which he demands judgment against the plaintiff. To the separate answer of the said E. B. Welch the plaintiff replied, admitting the allegation that the plaintiff was at the time mentioned, and still is, a corporation duly created under the laws of the state of Maine, and denying all the other allegations contained in said answer. Upon this state of the pleadings the plaintiff gave notice of a motion to strike out the counterclaims, upon the ground that they do not state facts sufficient to constitute either a counterclaim or a defense to this action, inasmuch as the same is brought by the plaintiff against the defendants, as co-partners, on claims alleged to be due by said

co-partnership, while the said counterclaims are interposed by the defendant E. B. Welch alone, on claims alleged to be due by the plaintiff to him individually. This motion was heard by his honor, Judge BENET, who, after hearing argument of counsel, granted the motion upon the ground that the action being against a partnership, upon an alleged partnership debt, one of the defendant partners cannot set up as a counterclaim a debt alleged to be due him individually by the plaintiff. From this order the defendants appeal, upon the several grounds set out in the record, which need not be stated specifically here, as the substantial and real question presented by the appeal is whether, to an action of law brought against defendants as co-partners, upon a demand alleged to be due by the partnership, one of the defendants can set up as a counterclaim a debt alleged to be due him individually by the plaintiff.

Under the common-law system of pleading which prevailed in the state prior to the adoption of the code of civil procedure, we do not see how there could be a doubt that the question presented by this appeal would have to be answered in the negative.

* * * * * * * * * * *

It only remains, therefore, to inquire whether this rule has been abrogated or modified by the code.

* * * * * * * * * * *

It seems to us, * * * that there is nothing in any of the provisions of the code which effects any change in the nature of a partnership contract, whereby it is converted from a joint contract into a joint and several contract, and that no change has been effected in the mode of proceeding for the enforcement of a partnership contract except in the particulars above stated, none of which are found in the present case. Hence it follows, according to the previously well-settled rule, that, in an action against a partnership on a partnership contract, no one of the persons composing such partnership can set up, by way of counterclaim or set-off, a demand due to him individually. This doctrine is fully recognized and affirmed in Pomeroy's Remedies (1st Ed.), in section 751, on pages 771, 772 and also in section 761, on page 782, where that distinguished author (whose work to which we have referred is regarded as standard authority upon questions arising under the code), after reviewing the decisions, says that certain spe-

cific rules are clearly established, the first of which he states in the following language: "When the defendants in an action are joint contractors, and are served as such, no counterclaim can be made available which consists of a demand in favor of one or some of them."

* * * * * * * * * * *

The judgment of this court is that the judgment or order of the Circuit Court be affirmed.[1]

[1] *Bringing in New Parties.* No cause of action is a proper subject of counter-claim which requires new parties to be brought in. McConihe v. Hollister (1865), 19 Wis. 269; Taylor v. Matteson (1893), 86 Wis. 113; Lowndes v. City National Bank (1907), 79 Conn. 693. But statutes sometimes expressly authorize the bringing in of new parties.

(e) Jurisdictional Amount.

GENERAL ELECTRIC COMPANY v. WILLIAMS.

Supreme Court of North Carolina. 1898.

123 North Carolina, 51.

DOUGLAS, J.: This case is before us on demurrer to a counter-claim. The action was originally brought before a justice of the peace, and subsequently heard on appeal in the Superior Court. The plaintiff sued for the sum of $171.85, for goods sold and delivered. The defendant denied all the allegations of the complaint, and set up as "a further defense and counterclaim" that he had paid $33 of the account, and had shipped to the plaintiff, to be repaired and returned, two arc lamps and one transformer, worth the sum of $165.16, which the plaintiff had never returned. Of these two sums, amounting to $198.16, the defendant remitted all in excess of the plaintiff's claim, and pleaded the remainder, $171.85, as a set-off. From this it would appear that the defendant, in denying the allegations in the complaint, intended simply to deny the indebtedness, as he does not seek to recover this amount. He does, however, go on further, and set up as a second counterclaim that he had shipped to the plaintiff four additional transformers, worth $180, which had never been returned, and that the damages caused by their detention amounted to

$80 in addition to their value. Of this sum of $260 he remits all in excess of $200, and prays judgment for that amount, with the costs of the action.

The plaintiff demurred, insisting, among other things, that the answer did not show that the counterclaims existed at the time of the bringing of the action, that they did not arise out of the same cause of action, and that their total amount was in excess of the jurisdiction of the justice of the peace. The demurrer was overruled, and the plaintiff appealed.

We think that the subject-matter of the counterclaims is sufficiently connected with the subject of the action to be maintained under section 244 of the code, as the transactions apparently all arise in the same general course of dealing. But we also think that the demurrer should have been sustained, inasmuch as the total amount of the unremitted counterclaims was in excess of $200, and therefore beyond the jurisdiction of the justice of the peace. In this computation we have entirely eliminated the alleged payment of $33, which is in no sense a counterclaim.

* * * * * * * * * * *

A true counterclaim, such as that at bar, to be capable of affirmative relief, must be one on which judgment might be had in the action, and must therefore come within the jurisdiction of the court wherein it is pleaded. Therefore it cannot exceed $200 in a justice's court; and, where several counterclaims are pleaded in the same action, their aggregate sum will be taken as the jurisdictional amount. These principles are laid down in the leading text-books, and sustained by a long line of authorities, which it is impracticable to cite. It simply remains for us to ascertain whether the counterclaims in the case at bar exceed in the aggregate the sum of $200, taking the allegations of the answer as true for the purpose of the demurrer. The plaintiff demanded the sum of $171.85. Deducting the alleged payment of $33, there remained only $138.85, which was set off by the defendant's first counterclaim, remitted to that amount. The defendant's second counterclaim was for $260, remitted to $200, for which he demanded judgment. But, as he had already set off $138.85, it was necessary to remit his second counterclaim to $61.15, to bring it within the jurisdiction. This he did not do, and

we cannot do it for him. The demurrer should therefore have been sustained.[1]

* * * * * * * * * * *

[1] *Accord:* Martin v. Eastman (1901), 109 Wis. 286; Haygood v. Boney (1894), 43 S. C. 63; Kilgore Lumber Co. v. Thomas (1910), 95 Ark. 43 (rule statutory.)

Where Counter-claim for Less than Jurisdictional Amount. The Supreme Court of California in Freeman v. Seitz (1899), 126 Cal. 291, 58 Pac. 690, held, as stated in the syllabus: "In an action arising upon contract of which the Superior Court has jurisdiction, though it has no jurisdiction, if the plaintiff's cause of action is defeated, to render an affirmative judgment in favor of the defendant upon a counter-claim upon another contract for less than three hundred dollars, yet it has jurisdiction, if plaintiff's cause of action is sustained, to allow such a counter-claim by way of partial defense, and as matter of compensation and extinguishment of the cross-demands between plaintiff and defendant, so far as they equal each other, under section 440 of the Code of Civil Procedure."

HOWARD IRON WORKS v. BUFFALO ELEVATING COMPANY.

Court of Appeals of New York. 1903.

176 New York, 1.

O'BRIEN, J.: The plaintiff's complaint was filed in the county court, and judgment was demanded for about $900, alleged to be due from the defendant for work, labor, and materials performed and furnished by the plaintiff at the defendant's request.

The answer, among other things, states that the work, labor, and materials described in the complaint were furnished and performed under a contract between the parties whereby the plaintiff contracted to manufacture and install at defendant's elevator, in a good, workmanlike manner, certain machinery described, and the plaintiff warranted the work and materials free from all defects, and agreed that the machinery so contracted for should be sufficient and suitable to move, control, and regulate the movements of two movable elevator towers for which the defendant was to pay over $3,000; that the plaintiff undertook to perform this contract, but the work and materials were so defective and unsuitable that the work was not only worthless, but by reason of the default on the part of the plaintiff to perform the contract the defendant

sustained damages in the sum of $30,000, and this sum was, upon these facts, interposed as a counterclaim in the action.

The plaintiff demurred to the counterclaim upon the ground that the court had no jurisdiction of the subject-matter thereof, since the counterclaim demanded a judgment against the plaintiff for more than $2,000. The county court overruled the demurrer, and gave judgment upon the issue of law in favor of the defendant. The appellate division has reversed this judgment by a divided court, and has certified to this court two questions, as follows:

First. Is the county court without jurisdiction over defendant's counterclaim herein because the amount demanded in said counterclaim exceeds $2,000?

Second. If the jurisdiction of the county court over counterclaims is limited, as to amount, to counterclaims wherein the amount demanded does not exceed $2,000, is such objection to defendant's counterclaim herein properly taken by the demurrer?

The substantial question presented is whether upon the face of the pleadings the county court has jurisdiction to try the matter involved in the counterclaim and to render judgment thereon. The facts set forth by the defendant in that part of the answer amount to an allegation that the plaintiff did not perform the contract sued upon, and that in itself is matter of defense. But the demurrer deals with the answer only so far as it is a counterclaim and demands an affirmative judgment, and hence the decision below must be deemed to relate only to that phase of the answer.

The provision of the present constitution and the code prescribing the jurisdiction of county courts are as follows: Article 6, § 14, of the Constitution enacts: "The existing county courts are continued. * * * County courts shall have the powers and jurisdiction they now possess, and also original jurisdiction in actions for the recovery of money only, where the defendants reside in the county, and in which the complaint demands judgment for a sum not exceeding two thousand dollars. The legislature may hereafter enlarge or restrict the jurisdiction of the county courts, provided, however, that their jurisdiction shall not be so extended as to authorize an action therein for the recovery of money only, in which the sum demanded exceeds two thousand dollars, or in which any person not a resident of the county is a defendant." Code Civ. Proc. § 340, follows

this provision of the Constitution, and limits the jurisdiction in cases for the recovery of money only by the demand of judgment in the complaint, which must be a sum not exceeding $2,000.

The view of the case that prevailed in the learned court below would produce some curious results in practice. In this case it is admitted on all sides that the court had complete jurisdiction of the action. The objection is that it has no jurisdiction of the defense by way of counterclaim. It is said that there is ample power to hear, determine, and award judgment on the plaintiff's claim, but no power to try or give judgment on the defendant's counterclaim, although it arises out of the very transaction stated in the complaint, and the only reason for this contention is that it is stated in the pleading at too large a sum. The large claim stated in the answer may fade away to a very small one after the proofs at the trial are all in, but it is argued that this makes no difference, since the court is without jurisdiction to take any proofs on the merits of the claim. An irresponsible party could implead his neighbor in the county court in an action wherein he demands just $2,000. The defendant sued may have a valid counterclaim which he regards as of no value except for defensive purposes, but if it amounts to more than $2,000 he cannot make use of it as a counterclaim to defeat the plaintiff's claim. If he has no other defense he must submit to have judgment pass against him. If he attempts to set it up to the extent of $2,000 he must release the balance, since the general rule is that a party cannot split up his claim into fragments and have a separate action upon each fragment. So that a defendant who has been brought into the county court by the act of the plaintiff in selecting his forum may have a valid and meritorious defense, but his hands are so tied that he is unable to avail himself of it by reason of the very magnitude of his claim. It is quite clear that a party may in this way select a forum for the litigation in which he has a strategic advantage over his adversary.

The mind does not readily accept the reasoning and arguments that lead to such conclusions. The first impression is that the argument must be faulty at some vital point, and I think the error is to be found in the attempt to enlarge by construction and analogy the express restrictions which

have been placed upon the jurisdiction of the county court by the constitution and the statute. The restriction as to the amount of the claim is based wholly on the demand of the complaint, but the learned court below has determined the question of jurisdiction upon the demand in the answer. The point of the decision is that not only is the jurisdiction limited to cases where the complaint demands judgment for a sum of money not exceeding $2,000, but to cases where the counterclaim contained in the answer does not exceed the same amount. This conclusion is the result of argument and analogy quite outside the words of the constitution and the statute.

Conceding all that has been said in the learned court below concerning the analogy between the cause of action stated in the complaint and the cause of action stated in the answer by way of counterclaim, the fact still remains that there is nothing in the constitution or the statute that forbids a defendant, when sued in the county courts, from interposing any defense that he may have to the cause of action stated in the complaint, and if it be a counterclaim exceeding $2,000 he is not forbidden to plead it, even though an affirmative judgment in his favor would result. The power of the court to render the proper judgment is not limited by the amount of the counterclaim, when jurisdiction of the action is once obtained, but the amount demanded in the prayer of the complaint is the sole test upon that question. In this case when the complaint was served the court acquired jurisdiction of the action, and consequently of any defense to it that grew out of the transaction stated in the cause of action, even though it was a counterclaim stated to amount to more than $2,000. When the plaintiff elected to bring his action in the county court, the right to try and render judgment upon any counterclaim that the defendant had followed the case as a necessary incident of the jurisdiction, without regard to its amount. The jurisdiction of the county court is a question that generally con-concerns the defendant, and is usually raised by a defendant sought to be subjected to its jurisdiction. In this case the question is raised by the plaintiff who selected that court as his forum, and now contends that the defendant is barred by reason of the limited jurisdiction from interposing defenses that it clearly could interpose had the plaintiff selected any other court. The contention ought not to be

sustained unless it appears to rest firmly upon authority, reason, and argument so clear and satisfactory as to be conclusive, and it seems to me that it does not.

It cannot be doubted that the legislature has power under the constitution to enact that when the county court acquires jurisdiction of an action by the service of a proper complaint the court may entertain any defense which the defendant, sued in that court, may have, even though it be a counterclaim alleged to be more than $2,000, and that, we think, is the effect, substantially, of section 348 of the Code of Civil Procedure. That section points out with great clearness what the power of the court is, after jurisdiction once acquired: "Where a county court has jurisdiction of an action or special proceeding, it possesses the same jurisdiction, power and authority in and over the same, and in the course of the proceedings therein, which the Supreme Court possesses in a like case; and it may render any judgment or grant either party any relief which the Supreme Court might render or grant in a like case. * * *" If the present action had been brought in the Supreme Court no question could be raised with respect to the power to try and render judgment upon the counterclaim, and the plaintiff having impleaded the defendant in the county court, upon a complaint that conferred full jurisdiction upon that court, it follows that it had power to render any judgment in favor of the defendant or grant it any relief that the Supreme Court could in a like case.

* * * * * * * * * * *

We think that the demurrer to the counterclaim was not well taken, and that the judgment of the appellate division should be reversed, with costs, and that of the county court affirmed.

PARKER, C. J., and GRAY, BARTLETT, HAIGHT, CULLEN, and WERNER, JJ., concur.

Judgment reversed.

(f) Existence at Commencement of Action.

SMITH v. FRENCH.

Supreme Court of North Carolina. 1906.

141 North Carolina, 1.

Plaintiff, holding a chattel mortgage on certain personal property of defendant, a crop, a horse, etc., to secure a debt in the sum of $150, brought this action of claim and delivery for the property, and the same was taken under process in this action and turned over to plaintiff. At the time of action brought, the note was past due, and the right of foreclosure had become absolute. The note is not set out, but the amount seems to be admitted by the parties, and is assumed to be $150 for the purposes of this appeal.

Plaintiff filed his complaint, alleging ownership of the property and its value. Defendant answered, admitting plaintiff's right to possession of the property under and by virtue of the debt and mortgage above referred to; averred that no demand for the property had ever been made on defendant before action was brought, and alleged further that under and by virtue of process in the cause, the property embraced in the mortgage to the value of $700 had been seized and turned over to plaintiff, who had wasted and converted the same, and demanded judgment against plaintiff for the value of the property over and above the amount due on the mortgage debt, and for other relief.

* * * * * * * * * *

DEFENDANT'S APPEAL.

HOKE, J.: Defendant, having filed an answer admitting plaintiff's right to possession of the property under the mortgage to secure the debt of $150, answered further, and alleged that there had been seized and turned over to plaintiff, under the process in the cause, property to the value of $700, which had been converted and wasted by the plaintiff, and tendered an issue as to the value of the property seized, to the end that defendant might have payment for any excess over and above plaintiff's debt. The court declined to submit the issue, confined the verdict to an issue as to

a demand by the plaintiff, and gave judgment as set out in plaintiff's appeal. Defendant excepted.

* * * * * * * * * * *

The court is of opinion that the issue tendered by the defendant or some proper issue determinative of the account on a correct basis should have been submitted, and for the purpose stated, that he might have judgment for the excess, if any were found in his favor. If plaintiff, on obtaining possession of the property, sold it, and in doing so observed the methods required by the contract, and the property was bought in good faith by a third person, it would seem that the amount realized at the sale would be the basis for a correct accounting. Our statute on counterclaim is very broad in its scope and terms, and is designed to enable parties litigant to settle well-nigh any and every phase of a given controvery in one and the same action, and should be liberally construed by the court in furtherance of this most desirable and beneficial purpose.

In Revisal 1905, § 481, a counterclaim is described and declared to be as follows: "The counterclaim mentioned in section 479 must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

"(1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

"(2) In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. Code, § 244; Code Civ. Proc., § 101." Subject to the limitations expressed in this statute, a counterclaim includes well-nigh every kind of cross-demand existing in favor of defendant against the plaintiff in the same right, whether said demand be of a legal or an equitable nature. It is said to be broader in meaning than set-off, recoupment, or cross-action, and includes them all, and secures to defendant the full relief which a separate action at law, or a bill in chancery, or a cross-bill would have secured to him on the same state of facts. Green on Code Pleading & Practice, § 815. And our own decisions fully bear out this statement of the doctrine. *Bitting v. Thaxton*, 72 N. C. 541; *Hurst v. Everett*, 91 N. C. 399; *Lee*

v. Eure, 93 N. C. 5; *Wilson v. Hughes,* 94 N. C. 182; *Electric Co. v. Williams,* 123 N. C. 51.

Under the old system of procedure the relief sought in defendant's answer was sometimes obtained in equity by way of cross-bill. Enc. of Pl. & Pr. vol. 4, p. 525.

It will be noted that the requirement restricting a counterclaim to one that exists at the tme the action was commenced is only stated in reference to the second class of counterclaims described in the statute—those wherein an action on a contract, the breach of an entirely different and distinct contract, is set up by defendant. This, for the very just and obvious reason that when a plaintiff rightfully sues a defendant who owes him at the time the action is commenced, he shall not be put in the wrong and subjected to cost by allowing defendant to buy up claims sufficient or more than sufficient to offset his debt. But this limitation is not expressed with reference to counterclaims in the first subdivision of the statute. These must be existent and continue to exist between the same parties in the same right at the time they are offered, and they must be then due—that is, not demands to become due in the future. And they must arise out of the same contract or transaction which is the foundation of plaintiff's claim, or they must be connected with the subject of the action—that is, generally speaking, the interest involved in the litigation, and very frequently this is the property itself.

As a matter of fact, in nearly every instance such a demand does exist when the action commences, but this is not the requirement of the statute, and, if the counterclaim otherwise complies with the limitations of subdivision 1, and is not embraced in subdivision 2, it would seem to be sufficient if it matures at any time before answer filed, and might be available if it matures at any time before the trial.

* * * * * * * * * * *

Even if the present opinion should be found to conflict with some former decision, it is only a question of procedure, not involving a rule of property, and we think it better that our present construction of the statute should be now declared the true one as more in accord with the spirit and letter of our code which, as heretofore stated, designs and contemplates that all matters growing out of

or connected with the same controversy should be adjusted in one and the same action.

A counterclaim connected with plaintiff's cause of action or with the subject of the same will nearly always take its rise before action brought, but we hold that neither the statute nor the reason of the thing require that such counterclaim should necessarily or entirely mature before answer filed nor before trial had, if the provisions of the code permit, and right and justice require, that an amendment be allowed which will enable parties to end the same controversy in one and the same litigation.

There was error in refusing to submit the issues tendered by the defendant on some proper issue on the question of an account, and a new trial is ordered.[1]

New trial.

[1] There are some *dicta* to the contrary: Kansas Loan & Investment Co. v. Hutto (1892), 48 Kan. 166; Gurske v. Kelpin (1901), 61 Neb. 517.

(g) Election between Counterclaim and Independent Action.

JONES v. WITOUSEK AND COMPANY.

Supreme Court of Iowa. 1901.

114 Iowa, 14.

The petition filed March 11, 1898, alleged that defendant undertook to put in plaintiff's house a water-heating apparatus, at the agreed price of $390, with the guaranty that it have a capacity of heating all rooms in which radiators are placed to a specified temperature in the coldest weather; that during the construction thereof $315 of the purchase price was paid; that upon completion, after numerous tests, it wholly failed to heat the house as agreed, and was of no value to plaintiff; that he tendered it back to defendants, who refused to receive it. And he prayed judgment for the amount paid less the value of certain radiators and pipes used by him in putting in another plant. The defendant entered a plea in bar to the effect that on the 27th day of June, 1897, the defendant brought suit for $75, the balance

of the purchase price, on said contract; that plaintiff defended therein by setting up the breach of said guaranty as now averred in his petition; that the justice of the peace rendered judgment for defendant therein (this plaintiff), whereupon an appeal was taken to the district court, and upon that a like result reached; that as this petition is based on the identical contract and breach thereof, and the parties are the same, plaintiff is estopped from prosecuting this action. To this plea the plaintiff demurred on the ground, in substance, that there has been no adjudication of the claim stated in the petition. The demurrer was overruled, and, as plaintiff elected to stand on the ruling, the petition was dismissed, and he appeals.

Reversed.

LADD, J.: Upon the failure of deefndant's guaranty, plaintiff had the election of two remedies: He could either pay for and retain the plant, and sue for damages, or rescind the contract by the return of the plant, and demand the portion of the purchase price previously paid. According to the petition, he pursued the latter course; and it must be conceded, for the purposes of the case, that there was a failure to comply with the terms of the agreement, and, owing to this, a timely tender of the return of the apparatus to the defendant. A good cause of action for the $315 paid was then stated. And the same facts furnished an equally good defense to the action by defendant in the justice court, and on appeal in the district court, for the portion of the purchase price ($75) which had not been paid. On what theory can it be said that, because these facts have been successfully pleaded in defense of a claim asserted by defendant, they may not furnish the basis of an action for recovery by the plaintiff? The latter could not have pleaded his cause of action by way of counterclaim, as it exceeded in amount the jurisdiction of the justice. Section 4477, code. Nor was he bound to do so. Section 3440, Id. Is he without a remedy? It is well settled that a set-off or counterclaim may or may not be pleaded, as the defendant shall elect; and, unless it is pleaded, the right to sue upon it as an independent cause of action, or to rely upon it in defense of another action by the same plaintiff, is in no wise affected or impaired by a judgment for or against the defendant. In other words, if the matter of set-off or counterclaim is presented and passed upon in a suit, it is barred

by the judgment; if not, the defendant may make it the subject of a separate and distinct action. *Hunt v. Brown*, 146 Mass. 253, 15 N. E. 587; *Roach v. Privett*, 90 Ala. 391, 7 South. 808; *Minnaugh v. Partlin*, 67 Mich. 391, 34 N. W. 717. See 19 Enc. Pl. & Prac. 731, and cases collected. The statutes in some states require an existing claim held by the defendant in an action to be pleaded as a counterclaim, while in others, in apparent exception to the above rule, a judgment on a cause of action is treated as a bar to a subsequent suit on a claim involving the same rights, which had been available as a defense in the former action. The best-reasoned case on this latter proposition, based on the notion that the right has once been adjudicated, is *Bellinger v. Craigue*, 31 Barb. 534. This court, however, took the opposite view in *Fairfield v. McNany*, 37 Iowa, 75; and, indeed, as there said, the matter is disposed of by our statute, which provides that a "judgment does not prevent the recovery of any claim, though such claim might have been used by way of set-off, counterclaim or cross-demand in the action in which judgment was recovered." Section 3440, code.

* * * * * * * * * * *

We discover no tenable ground for the order overruling the demurrer, and it is reversed.[1]

[1] In some states there are statutes providing that a cause of action properly the subject of a counter-claim shall be so used or it shall be forfeited: *California*, Code Civ. Pro. § 439; *Idaho*, Rev. Codes, § 4185; *Montana*, Code Civ. Pro. § 697; *Utah*, Comp. Laws, 1907, § 2970.

In other states the penalty provided for failure to use such a cause of action as a counter-claim is that it can be subsequently prosecuted by the defendant only at his own costs: *Indiana*, Burn's St., 1908, § 356; *Nebraska*, Code Civ. Pro. § 102; *Oklahoma*, Comp. Laws, 1909, § 5636; *Wyoming*, Comp St., 1910, § 4398.

In *Ohio* the statute expressly authorizes a counter-claim to be withdrawn at any time before final submission of the cause, to be subsequently proceeded with as a separate action. Gen. Code, 1910, § 11337.

(h) Effect of Assignment on Right to Counterclaim.

STADLER v. FIRST NATIONAL BANK OF HELENA.

Supreme Court of Montana. 1898.

22 Montana, 190.

Action by Louis Stadler and another against the First National Bank of Helena and another. From the judgment of the court below, plaintiffs appeal; and from a part thereof the First National Bank of Butte, defendant, appeals. Modified.

This was a suit to obtain a decree setting off certain deposits made by the plaintiffs in the First National Bank of Helena, hereinafter called the "Helena Bank," against the amount of a promissory note made by them as a firm to said bank, and transferred to the defendant the First National Bank of Butte, hereinafter called the "Butte Bank." The Butte Bank set up a counterclaim for the amount of the note. Trial was had by the court sitting with a jury.

It appears that Stadler & Kaufman is a co-partnership composed of Louis Stadler and Louis Kaufman. On July 18, 1896, Stadler & Kaufman, for value received, executed to the Helena Bank a promissory note, of which the following is a copy: "$6,000.00. Helena, Montana, July 18th, 1896. Sixty days after date, for value received, we or either of us, promise to pay to the First National Bank of Helena, Montana, or order, six thousand dollars, negotiable and payable at the First National Bank of Helena, Montana, with interest at the rate of 8 per cent. per annum from date until paid. The makers and indorsers hereby waive presentment, demand, protest, and notice of each and all thereof, and of non-payment, and agree to pay reasonable attorney's fees in case of suit on this note. Stadler & Kaufman."

When the note was made, Stadler & Kaufman had on deposit in the Helena bank, subject to check, the sum of $413.37. Kaufman individually had then on deposit in that bank, $4,240, represented by a certificate of deposit dated January 8, 1896, by the terms of which the Helena bank promised to pay to his order said sum at 6 months after

date, with interest at the rate of 5 per cent. per annum. Kaufman at that time had also on deposit in the Helena bank $5,000, for which the bank had issued its certificate of deposit of November 6, 1895, whereby it promised to pay to the order of Kaufman $5,000, 12 months after date, with interest at the rate of 6 per cent. per annum. On said July 18, 1896, Stadler had on deposit in the Helena bank $5,000, for which he held its certificate of deposit dated November 6, 1895, whereby the bank promised to pay to his order that sum 12 months after date, with interest at the rate of 6 per cent. per annum. On the day the note was made, July 18, 1896, the Helena bank, by its formal indorsement, transferred the $6,000 promissory note to the Butte bank, for which note the latter bank paid to the Helena bank the principal sum of the note. Ever since that time the Butte bank has been the owner and holder of the note, no part whereof has been paid. The Helena bank, on September 4, 1896, by reason of its insolvency, closed its doors, suspended business, and was taken possession of by the comptroller of the currency, and since that day has been in charge of defendant receiver. Prior to September 8, 1896, plaintiffs had not been notified, nor were they aware, that their note had been transferred to the Butte bank. No demand for the payment of any of the deposits standing to the credit of plaintiffs, or to the credit of either of them, was made until after September 4, 1896. * * *

PIGOTT, J.: 1. The Butte bank acquired the $6,000 note of Stadler & Kaufman by indorsement, in the ordinary course of business, in good faith, for value, and before maturity; hence it is apparent that, if the note be commercial paper, the Butte bank acquired an absolute title thereto, notwithstanding any defect in the title of the Helena bank (Civ. Code, §§ 4034, 4035); that is to say, the Butte bank took it free of, and discharged from, any defense, legal or equitable, which existed as between the makers and the payee, and therefore the Butte bank would be entitled to a judgment for the full amount thereof, without reduction by reason of any set-off claimed by plaintiffs.

The contention of defendants is that the note is negotiable, while plaintiffs insist that the agreement therein contained to pay attorney's fees in case of suit destroys the quality of negotiability otherwise possessed by it. It has been a much-debated question whether such a promise is

fatal to negotiability, and the courts are pretty evenly divided upon the subject. * * *

* * * * * * * * * * *

2. The note is nonnegotiable. It therefore becomes necessary to inquire into the title obtained thereto by the Butte bank, and for that purpose convenience may be attained by regarding the action as one brought by the Butte bank upon the $6,000 note, in which Stadler and Kaufman, as a co-partnership and as individual persons, claim the right to set off deposits to their credit in the Helena bank. The Butte bank took the note subject to the provisions of section 1982 of the civil code, and of sections 571, 690-692, and 698 of the code of civil procedure. Section 1982 provides that "a nonnegotiable written contract for the payment of money or personal property may be transferred by endorsement in like manner with negotiable instruments. Such endorsement shall transfer all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the endorsement." Section 571 provides, in substance, that an action by the assignee of a nonnegotiable thing in action "is without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment."[1] By section 690, the defendant may plead a counterclaim, which, by section 691, "must tend in some way to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action: * * * (2) In an action on contract, any other cause of action on contract, existing at the commencement of the action." So much of section 692 as is pertinent reads: "But the counterclaim specified in subdivision two of the last section, is subject to the following rules: (1) If the action is founded upon a contract, which has been assigned by the party thereto, other than a negotiable promissory note or bill of exchange, a demand, existing against the party thereto, or an assignee

[1] Almost all of the codes have a provision of this character, most of them adding the following limitation: "But this section shall not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon valuable consideration before due."

of the contract, at the time of the assignment thereof, and belonging to the defendant in good faith, before notice of the assignment, must be allowed as a counterclaim, to the amount of the plaintiff's demand, if it might have ben so allowed against the party, or the assignee, while the contract belonged to him." Section 698 is as follows: "When cross-demands have existed between persons under such circumstances that (if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived thereof by the assignment or death of the other."

The first position taken by plaintiffs is that a defendant who is sued by the assignee of a nonnegotiable chose in action may, in virtue of section 571, interpose as defense, by way of set-off, a demand held by him against the assignor, and which came into existence after the making, and before notice to defendant, of the assignment; in other words, that until notice is given to him such assignment is not complete so as to prevent defendant, when sued by the assignee, from asserting, as set-off against the assigned claim, a demand against the assignor which arose subsequently to the date of the transfer.

As has been stated, when the note was transferred to the Butte bank, Stadler & Kaufman had one deposit in the Helena bank subject to check $413.37, and Kaufman had on deposit in the same bank $4,240, which was payable on and after July 8, 1896, upon presentation of the certificate. Stadler and Kaufman each had then on deposit in that bank $5,000, payable on and after November 6, 1896, upon presentation of the certificate representing the same. Plaintiffs argue that since notice of the assignment of the note was not given until September 8, 1896, which was after the Helena bank had suspended payment and had been taken charge of by the comptroller, the Butte bank took the note subject to all rights of set-off existing in favor of plaintiffs and against the Helena bank on September 8, 1896; and that since the effect of the declared insolvency of the Helena bank was to cause debts owing by it, and for want of demand not otherwise due, to become due and actionable instantly, the equitable right to set off the deposits was perfect on September 4th, when the bank closed its doors. They urge that the last sentence of section 1982 of the civil

code, declaring that the indorsement of a nonnegotiable contract shall transfer to the assignee the rights of the assignor subject to all equities and defenses existing in favor of the maker at the time of the indorsement, is enlarged, by the provisions of section 571 of the code of civil procedure, so as to permit the assertion as a set-off of a demand against the assignor arising intermediate the indorsement and notice thereof.

We are unable to agree with the foregoing interpretation of sections 1982 and 571. The former makes general provision that the indorsement shall transfer all the rights of the assignor, subject to such equities and defenses as may exist in favor of the maker at the time of the indorsement, but it does not define or specify the equities and defenses which may be availed of by the maker of the contract. This section is found in that portion of the statutes treating of substantive law. Section 571 is part of the practice act, the chief purpose of which is to indicate the means whereby the rights created, declared, and limited in the civil code and elsewhere are to be enforced, and to prescribe the modes of procedure thought best adapted to accomplish the attainment of the end desired,—the protection of those rights. Were there a mere verbal conflict between these sections, no reason occurs to us why section 571,—which, as we shall see, does not profess to establish new rights, but only to declare the application of an old principle to new conditions,—should control or enlarge the effect of section 1982. But, in either the interpretation or construction of statutes, consideration of the general scope and purpose of a particular code becomes important only as an aid in the effort to ascertain the true intent and meaning of a statute contained in it. Hence if, because of substantial inconsistencies between them, or for any reason, it should appear that section 571 was intended to enlarge or restrict, in respect of set-off, the effect of section 1982, the courts would be bound so to declare.

The sections are not in conflict, nor does one in any wise limit the operation of, or expand, the other. Section 571 is found in the chapter devoted to the subject "Parties to Civil Actions," and immediately succeeds the provision of section 570, to the effect that every action must be prosecuted in the name of the real party in interest. Now, at the common law, the assignee of a nonnegotiable contract

could not maintain an action thereon, in his own name, but only in the name of the assignor. The change in this respect brought about by section 570 was the reason for the enactment of section 571. In section 571, as in section 1982, no attempt is made to define "set-off." The questions as to what a set-off is and when it accrues are left to be answered by reference to, and the application of, other statutes and laws. It does not change the substantial rights of the parties, but, in the language of the opinion in *Beckwith v. Bank,* 9 N. Y. 211: "Section 112 was intended only to introduce such alterations in the mode of protecting them as were rendered necessary by the provisions of sections 111 and 113, which require in most cases the real party in interest to be the plaintiff. The first branch of the section will have its full and appropriate meaning if we regard it as providing that, 'in the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment,' which would have been available to the defendant had the action been brought in the name of the assignor. In other words, the provision is that the substantial rights of the defendant shall not be affected by the substitution of the assignee as plaintiff in place of the assignor." Section 112 of the code of New York of 1849, referred to in the quotation, is identical with section 571, *supra,* and sections 111 and 113 are similar to section 570, *supra.* To the same effect is *Myers v. Davis* (1860), 22 N. Y. 489, where the court said: "The alteration of the practice allowing the beneficial owner of a chose in action, not negotiable at law, to sue thereon in his own name, does not change the actual rights of the parties to any assignment of it. The defendants in this action are therefore entitled to the same defense which they would have had if the former rule had continued to prevail, and this action had been brought in the name of Watrous and Lawrence (assignors), and to no other or different defense. The assignee would have been protected in his equitable rights, notwithstanding the nonnegotiable nature of the contract, to the same extent that he is entitled to have them protected now that he can prosecute in his own name. The change effected by the code is simply as to the form in which the action is to be carried on." *Martin v. Kunzmuller* (1867), 37 N. Y. 396, and a multitude of other decisions,

have been rendered in approval of the foregoing interpretation, which we deem unnecessary to cite, for this construction is now firmly established. In Pomeroy's Code Remedies, at section 156, it is said that this construction is now universally, as well as firmly, established. That it is firmly established is apparent, but that it is universal is not strictly accurate; for the Supreme Court of California in *McCabe v. Grey,* 20 Cal. 509, and in *Bank v. Gay,* 101 Cal. 290, 35 Pac. 876, and the Supreme Court of Arizona in *Martin v. Wells,* 28 Pac. 958, and perhaps other courts, seem to have entertained a contrary view of the meaning of sections identical with section 571.

We must therefore turn to other provisions of the law in order to ascertain what a set-off is, and when it may be allowed as against the assignee of a contract. "Set-off," ex vi termini, implies reciprocal demands existing between the same persons at the same time, as is substantially expressed in section 698, supra. By section 1982, the indorsement of a contract not negotiable transfers to the assignee the title of the assignor, subject to all equities and defenses existing in favor of the maker of the contract at the time of the indorsement; and the design of the provision is explained, and its effect defined, as to set-off, by section 692, which treats particularly of, and is devoted to, counterclaims, including set-offs. Subdivision 1 of section 692 is, in substance, subsection 8 of section 18, at page 366, of the Revised Statutes of New York of 1867, in force in that state ever since the year 1847, and perhaps from an earlier date. Said subdivision 1 is a copy of subsection 1 of section 502 of Throop's Annotated Code of Civil Procedure of New York of 1888, and is also identical with subsection 1 of section 502 of Stover's New York Annotated Code of Civil Procedure of 1897. The courts of New York are practically unanimous in holding that, while notice of assignment is required to cut off other defenses in favor of the defendant and against the assignor, it is not necessary with respect to set-off, either at law or in equity; that a demand against the assignor, to be a set-off a law, must exist in the form of a debt due and payable from the assignor at the date of the transfer, and that a debt owing by the assignor, not then due and actionable, but which becomes so prior to notice of the transfer is not a legal set-off; and that, to be available against the assignee, the equitable right to a set-

off must attach at the time of the transfer, and cannot arise afterwards. * * *

The supreme courts of Missouri, Wisconsin, and Ohio, in *Huse v. Ames*, 104 Mo. 91, 15 S. W. 965, *Kinsey v. Ring*, 83 Wis. 536, 53 N. W. 842, and *Fuller v. Steiglitz*, 27 Ohio St. 355, and other courts, adhere to the same doctrine. Upon this subject Mr. Pomeroy, in section 163 of his work on Code Remedies, says:

"The assignee takes the demand assigned subject to all the rights which the debtor had acquired prior to the assignment, or prior to the time when notice was given, if there was an interval between the execution of the transfer and the notice; but he cannot be prejudiced by any new dealings between the original parties after notice of the assignment has been given to the debtor. When two opposing debts exist in a perfect condition at the same time, either party may insist upon a set-off. If, therefore, the holder of such a claim, already due and payable, assign the same, and the debtor, at the time of this transfer, holds a similar claim against the assignor, which is also then due and payable, he may set off his debt against the demand in the hands of the assignee. If, however, the assignment is made before the opposing demand becomes mature, and the latter does not thus become actually due and payable until after the transfer, the debtor's right of set-off is destroyed by the mere fact of the assignment, and no notice thereof to him is necessary to produce that effect. The following special rule also exists under the peculiar circumstances mentioned: If an insolvent holder of a claim not yet matured assigns the same before maturity, and the debtor, at the time of this transfer, holds a similar claim against the assignor, which is then due and payable, his right of set-off against the assignee, when the latter's cause of action arises, is preserved and protected. This latter doctrine is based upon considerations of equity, and is intended to prevent one party from losing his own demand on account of the insolvency of his immediate debtor, and from being at the same time compelled to pay the debt originally due from himself to that insolvent. These three rules existed prior to the codes, and have not been changed by the provisions of the statute under consideration." And in section 166 he says: "Notice may be required to cut off other defenses; but a set-off, accord-

ing to the accepted rule, must exist in the form of a debt then due and payable to the debtor at the date of the transfer."

Inspection of the statutes makes it evident that notice to the debtor of the transfer of his debt is not necessary to prevent the successful interposition, as a set-off at law against such debt, of a claim against the assignor which was not due and payable at the time of transfer, and the authority of adjudged cases is in affirmance of this doctrine, although in some jurisdictions a contrary rule is announced.

It is to be remarked, in passing, that, while we speak of "set-off" as a defense, this use of the word is neither technically correct nor warranted by sections 690, 691, and 692, supra, which include within the definition of "counterclaim" that which was formerly "set-off," and which provide for "defenses" as contradistinguished from "counterclaims." *Babcock v. Maxwell,* 21 Mont. —, 54 Pac. 943. We venture to use "set-off," and to speak of it, as a defense, because in section 571 it is so used; and also because the ultimate natural effect of allowing the deposits as a counterclaim against the note in the hands of the Butte bank would be set-off, since the deposits owing by the assignor to plaintiffs could be used only defensively, as against the assignee, to diminish or defeat recovery by it, and not as a basis for a money judgment.

No new dealings were had, or agreements made, between plaintiffs and the Helena bank after the assignment of the note and before notice thereof; and this opinion is not to be construed as denying the right to interpose any defense which might have vested in plaintiffs consequent upon satisfaction, by payment to the Helena bank or otherwise, of the note, in whole or in part, before notice of assignment, or which might have resulted from the execution or partial performance by plaintiffs, prior to such notice, of a contract with the Helena bank for a set-off of the deposits against the note. We hold, then, that, by the indorsement of July 18th, the right to recover the amount of the note upon maturity was transferred to the Butte bank, subject only to such claims as the makers might at that time have been allowed to set off, at law or in equity, against the Helena bank. In other words, the claim of plaintiffs is not a set-off against the assignee for value, unless it could

have been properly asserted as such against the assignor while the note belonged to the latter. The Butte bank took the note subject to any right of set-off which plaintiffs may have had against the Helena bank at the time of the indorsement. We shall ignore, for the present at least, the fact that the three certificates represent deposits to the credit of the several members of the firm, and regard them as debts owing by the Helena bank to Stadler & Kaufman. Under sections 691 and 692, and at law, there can be no set-off of one debt against another unless both were due and payable before the transfer of either to a third person. *Coffin v. McLean,* 80 N. Y. 560; *Munger v. Bank,* 85 N. Y. 580. The note was transferred July 18th, and fell due September 16th. Its immaturity when indorsed prevented the deposits, whether due or not, from being a legal set-off.

Did plaintiffs on July 18th have the right, in equity, to set off the deposits against the note? They maintain they did upon three grounds, which, as we understand them, may be epitomized as follows: * * * and (3) that the Helena bank was insolvent on July 18th, and that all the deposits were then due and payable.

* * * * * * * * * * *

* * * Were the deposits due July 18th, and was the First National Bank of Helena then "insolvent," within the meaning of that word appropriate to the state of facts shown? If both conditions existed on July 18th, plaintiffs were then possessed of an equitable right to set off the deposits against the underdue note. * * *

* * * * * * * * * * *

* * * The court found, upon sufficient evidence, that if the Helena bank had been closed, and its business settled, on July 18, 1896, the amount that could have been realized from its assets would have been less than its liabilities at that time; that on July 18th, and thereafter, until September 4th, it was unable, from its own means, to pay its debts as they matured, but that it did during such period actually meet and pay its obligations as they became due, in the ordinary course of business. "Insolvency" has two meanings. In its popular sense, it signifies that condition of a person whose entire assets are insufficient to pay his debts in full. The term is, however, used, in a restricted sense, to express the present inability of a trader to pay

his current obligations as they mature, in the usual course of business. * * *

We have been unable, after diligent search, to find any persuasive authority to the effect that mere excess of liabilities over assets makes a trader insolvent so as to clothe his debtor with such equity, whatever may be its effect otherwise. * * *

It follows that the action of the court in disallowing the two certificates of deposit for $5,000 each and the certificate for $4,240 as set-offs was correct, but that in allowing the deposit of $413.37 the court erred; in short, that the First National Bank of Butte is entitled to recover upon the note, and that plaintiffs are not entitled to any set-off against it. That part of the judgment appealed from by the bank will therefore be reversed, and the cause remanded, with direction to the court below to modify the judgment so that it shall conform to the views expressed in this opinion, and to enter it as modified; and it is so ordered.

Modified.

BRANTLEY, C. J., and HUNT, J., concur.

ST. LOUIS NATIONAL BANK v. GAY.

Supreme Court of California. 1894.

101 California, 286.

MCFARLAND, J. On February 4, 1891, defendant Gay made and delivered to D. D. Dare two nonnegotiable notes, each for $2,500 and interest, and each payable one year after date. On February 24, 1891, Dare assigned these notes to the plaintiff. On February 12, 1891, Dare made and delivered to J. M. Collins his negotiable promissory note for $5,000 and interest, payable one year after date; and on October 21, 1891, said note to Collins was purchased by and regularly assigned to defendant. At the time of this purchase defendant had no notice that his note to Dare had been assigned to plaintiff, but several months afterwards, on February 1, 1892, he was notified of such assignment, and at the time of such notice the note from Dare

to Collins was not quite due; the date of its maturity being February 12, 1892. The two notes sued on matured February 4, 1892. The present action was commenced August 1, 1892, several months after all the notes had matured. The defendant pleaded as a counter-claim the said note from Dare to Collins, and the court allowed it, and deducted its amount from the judgment in favor of plaintiff. The plaintiff appeals from the judgment upon the judgment roll, and contends that the court erred in recognizing said Collins' note as a legal set-off.

The first contention of appellant is that the set-off was not available, because it was not acquired until after the said assignment from Dare to appellant, notwithstanding the fact that it was acquired before notice of such assignment. This contention is based on section 1459 of the Civil Code, which provides that the assignee of a nonnegotiable written contract for money or personal property takes it "subject to all the equities and defenses existing in favor of the maker at the time of the endorsement." But section 368 of the Code of Civil Procedure provides as follows: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defense existing at the time of or before notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before maturity." These two sections must be construed as though they "had been passed at the same moment of time, and were parts of the same statute." Pol. Code, § 4480. Section 1459 is not restrictive; and the maxim, expressio unius, etc., does not apply to it when considered in connection with said section 368, which became law at the same moment. The two sections are not contradictory, and therefore the rules of construction which aid in cases of contradictory provisions need not be invoked. The one section is merely an enlargement of or addition to the other, and the law as declared by the two sections is that a defendant may avail himself of a set-off acquired before notice of assignment, provided the set-off be in other respects good. It was so held in *McCabe v. Grey*, 20 Cal. 510, and has been assumed to be the law ever since. Appellant refers to the fact that in Pomeroy on Remedies and Remedial Rights, (section 166,) *McCabe v.*

Grey, is hostilely criticized; but, in this instance at least, the opinion of the text writer has not overruled the decision of the court. We see nothing in the contention that one of the sections should be construed as referring to choses in action different from those embraced in the other. Section 368 embraces every kind of things in action except negotiable paper, which paper alone is excepted from its operation.

Appellant seems to contend that there can be a value set-off to a nonnegotiable note only when the matter of set-off arises out of the note itself, as want of consideration, etc., and that it cannot arise out of another distinct, independent contract; but this is not the meaning of "set-off," as used in section 368, although such meaning might be not inaptly given to what was once commonly called "recoupment." The meaning of set-off is correctly stated in Abbott's Law Dictionary, with authorities cited, as follows: "Set-off differs from recoupment in that it is more properly applicable to demands independent in their nature and origin while recoupment implies a cutting down of a demand by deductions arising out of the same transaction." "Counter-claim," as used in our code, includes both recoupment and set-off, and is, strictly speaking, a pleading by which matters arising out of recoupment or set-off are averred. It may be used by defendant to plead, as against the plaintiff: "(1) A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the cause of action; (2) in an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action." Code Civ. Proc. § 438.

The only point of any difficulty in the case at bar is raised by appellant's contention that respondent cannot use the note from Dare to Collins as an offset, because it was not due at the time he received notice of the assignment from Dare to appellant, although full title to it had been acquired before such notice. His position is that a set-off is not available against an assignee unless it be due, payable, and suable at the time of notice of assignment. There are New York authorities to this effect, but the statute law of New York upon the subject is essentially different from that of California. The New York cases go upon the theory that the statute there provided that the counter-

claim must be such as might have been set off while the contract belonged to the assignor. *Myers v. Davis,* 22 N. Y. 491; *Martin v. Kunzmuller,* 37 N. Y. 396; *Fuller v. Steiglitz,* 27 Ohio St. 355. But there is no such statute in this state. By section 438 of the Code of Civil Procedure, in an action on contract the defendant may set up any cause of action arising upon contract and "existing at the commencement of the action." If Dare had kept his note and sued on it in August, 1892, respondent could unquestionably have set off the Collins' note; and it seems a clear proposition of law, under the sections of our code, above stated, that, in an action by the assignee of a chose in action not negotiable, the defendant may successfully plead any set-off which he could have so pleaded against the assignor, if he had retained and brought suit on it, provided he acquired it before notice of assignment, and provided, further, that it was "existing at the commencement of the action." It is contended that at the time of the notice of assignment the Collins' note was not an "existing" set-off because it was not then quite due, and therefore not presently suable. But the thing itself—the note, the chose in action—was then existing, and it was pleadable by counterclaim when this action was commenced.

The point under review has not been definitely determined in this state; and it may be considered *res integra.* There has been a diversity of decisions on the subject in other states, and, as was said by the supreme court of Ohio, in *Fuller v. Steiglitz, supra,* "the phraseology of different statutes give rise to this diversity in the cases." Under our statutory provisions we think that the correct rule is that stated in *Bank v. Balliet,* 8 Watts & S. 311. In that case suit was brought upon a bond given by defendant to the bank, and assigned to one Swader, and defendant set up certain obligations of the bank which he had acquired before notice of the assignment—some of such obligations, it seems, not being due at the time of such notice. The court say: "The court was right in admitting the evidence, because, although the liability of the bank was not complete when the defendant had notice of the assignment, yet the transaction out of which the defense arises commenced before he was informed of the transfer of the bond." And, again, the court say: "The time the contract begins between the assignee and the obligor is when the lat-

ter has notice of the assignment. It is the duty of the obligee or assignee to inform the obligor that he has parted with the bond, and if this is omitted they are in default, and not the obligor, who, until he is informed otherwise, has a right to suppose that the bond is still the property of the obligee, and to act and contract with the obligee, or others, under that reasonable supposition." This rule seems to us to be just and right. A debtor may fortify himself against the coming suit of his creditor by the purchase of any cross demands which may be counter-claimed when that suit shall come, and between them an assignee has no standing until he shall have given notice of the assignment. When a stranger voluntarily interferes with relations between third parties, and takes an assignment of an obligation from one of the latter to the other, he is in no position to beg for equitable consideration, and has only such right in the premises as the statute gives him, and under the statute he stands in the shoes of his assignor until he gives notice of the assignment; but such notice in no way destroys or impairs any right which the debtor had acquired against the creditor prior to such notice. The relative times at which the notes in the case at bar matured is of no consequence, since they were due at the commencement of the action; for, under the rule invoked by appellant, a debtor could not use a note falling due before his own obligation, if before its maturity he received notice of assignment. Moreover, under such rule, if A. should give B. his nonnegotiable note for a certain sum of money, due in six months, and B. should afterwards employ A. to render certain services, to be paid for at the maturity of said note, the latter could not safely rely upon the value of the services as a set-off to the note; because, after the services had been rendered, the set-off could be defeated by an assignment of the note and notice of the assignment before compensation for the services was in praesenti due and payable.

The judgment is affirmed.

FITZGERALD, J., and DE HAVEN, J., concurred.

(i) Equitable Set-off.

PENDELTON v. BEYER.

Supreme Court of Wisconsin. 1896.

94 Wisconsin, 31.

The action is brought for the settlement of the accounts of a partnership which has already been dissolved. It is not stated whether there are any firm creditors. The plaintiff alleges that on settlement there will be found a large sum due him. He demands judgment for the recovery of such sum as may be found due him on such settlement. The answer denies that anything will be found due the plaintiff on settlement, and alleges that plaintiff is insolvent, and sets up by way of counter-claim several claims against the plaintiff, owned by the defendants severally; some relating more or less to the transactions of the partnership, and some growing out of matters entirely independent of the partnership transactions. The answer asks that these several claims be set off against whatever sum may be found due the plaintiff, and judgments in favor of the defendants severally for any balance in their favor. The plaintiff demurred to that part of the answer which sets up these alleged counterclaims, on the grounds that such counterclaims are not proper to be pleaded in such an action, and do not show a cause of action against the plaintiff. The demurrer was overruled, and the plaintiff appeals.

NEWMAN, J. This case is anomalous. Strictly speaking, and in the ordinary sense of the word, the plaintiff has no claim to enforce against his co-partners, or either of them. If the defendants owe anything, they owe it to the partnership, and not to the plaintiff. If anything is due from them, it is due to the partnership, and not to the plaintiff. *Sprout v. Crowley*, 30 Wis. 187; *Smith v. Diamond*, 86 Wis. 359, 56 N. W. 922. Hence the plaintiff has, strictly, no *claim* against the defendants, or either of them. The credits of the firm are to be collected and applied to the payment of its debts, and the residue, if any, is to be distributed among the partners in proportion as they are

entitled under the partnership agreement. This is usually done through the instrumentality of a receiver. Not until after the payment of firm debts and the ascertainment of the residue can any claim arise in favor of any partner. The plaintiff, then, would not be entitled to a judgment against the defendants, or either of them, for his share is not due from them, but from the partnership fund. It is a fund in court, to be distributed under direction of the court. So, too, if a partner owes an individual debt to his co-partner, that in no way concerns the firm, and, under ordinary circumstances, a claim for such a credit can have no place in an action to dissolve a partnership and settle up its affairs. *Smith v. Diamond, supra.* It is manifest that the claims against the plaintiff which the defendants propose to set off against the problematic claim of the plaintiff are not such claims as are authorized to be set off by either the statute of set-offs, or counterclaims. Rev. St. §§ 2656, 4264. They are, at least, not claims "existing in favor of a defendant against a plaintiff between whom a several judgment may be had in the action." But, while set-off is altogether of statutory origin, equity had a well-established jurisdiction and practice regulating set-offs before any statute on the subject was passed. In general the right was limited to matters "connected with the subject of the action," and could only be founded upon matters relied upon in the complaint. The debts to be set off must have some connection with each other. But in case of mutual demands, and in cases where the debt due the party claiming the set-off is so situated that it is impossible for him to obtain satisfaction of such debt by an ordinary suit at law or in equity to recover the same, a court of equity would compel an equitable set-off of one debt against the other. And the insolvency of the party against whom the set-off is claimed was held to be a sufficient ground for the exercise of this jurisdiction of the court of equity in allowing a set-off in cases not provided for by the statute. This court has recognized the existence of that jurisdiction. In *Spear v. Day,* 5 Wis. 193, the court say: "In a proper case a court of equity would undoubtedly, by virtue of its general jurisdiction, apply the doctrine of set-off, independently of the statute." Many times it has referred to the insolvency of the party against whom the set-off

is claimed as being a sufficient ground for the exercise of that jurisdiction. *Hiner v. Newton,* 30 Wis. 640; *Linderman* v. Disbrow, 31 Wis. 465; *Body v. Jewsen,* 33 Wis. 402; *Seligmann v. Heller,* 69 Wis. 410; *Jones v. Pierling,* 85 Wis. 264. The doctrine is held in many cases. A few will be mentioned. *Gay v. Gay,* 10 Paige, 369; *Ives v. Miller,* 19 Barb. 196; *Cummings v. Morris,* 25 N. Y. 625; 22 Am. & Eng. Enc. Law, 418-420, and cases cited.

This case seems to come within the spirit of this equitable doctrine. The plaintiff is insolvent. If, on the accounting and settlement of the partnership matters, anything shall be found due the plaintiff from the partnership, and it should be paid over to him, it would, apparently, be impossible for the defendants to obtain satisfaction of their claims against him. Actions at law upon these claims would be futile. So it seems that justice requires whatever sum may be found due to the plaintiff shall be applied to the payment of these claims of the defendants.

It matters little whether these claims shall be deemed technically counterclaims. They are deemed at least proper claims to be subtracted from such amount as shall be found due the plaintiff on such accounting, and it was proper at least that the plaintiff should be notified of the defendants' intention to ask to have them so applied.

Some of these proposed set-offs are against the plaintiff and another. Both are alleged to be insolvent. If these claims are several as well as joint, there is no valid reason why they also should not be applied in this way as set-offs.

BY THE COURT. The order of the Circuit Court is affirmed.[1]

[1] In Porter v. Roseman (1905), 165 Ind. 255, the court said: "It is recognized by the courts of this state, and perhaps all other American states, that a court of equity will take cognizance of cross-claims between litigants, though wholly disconnected and wanting in mutuality, and set off one against the other whenever it becomes necessary to effect a clear equity or prevent irremediable injustice."

In Ewing-Merkel Electric Co. v. Lewisville Light & Water Co. (1909), 92 Ark. 594, an unliquidated demand ordinarily not a subject of set-off, was permitted against a non-resident on the theory of an equitable set-off.

(j) *Claims against Co-defendants.*

KOLLOCK v. SCRIBNER.

Supreme Court of Wisconsin. 1897.

98 Wisconsin, 104.

On the 1st day of April, 1886, Wiley S. Scribner leased to the plaintiff the premises described in the complaint, for the term of 10 years from that day, "with the privilege of a renewal." Since that time, up to the commencement of this action, plaintiff occupied the premises under said lease, and performed all the conditions thereof on his part to be performed. Subsequent to the making of the lease the lessor died and defendant Mary L. Scribner became the owner of the property by descent, under the laws of this state. Thereafter she sold the property and conveyed the same to defendant Kaiser by deed with full covenants, taking back a mortgage to secure the payment of $12,000 of the purchase money. She held the mortgage and the debt which it secured at the time of the commencement of this action. Plaintiff duly demanded a renewal of his lease for an additional term of 10 years by the making of a lease containing all the provisions of the old one, except the covenant for renewal. The demand was refused. This action was brought against the defendant Scribner and her vendee Kaiser on a complaint setting forth all the aforesaid facts. Two causes of action were set forth in the complaint, one for specific performance and the other to quiet title. Defendant Scribner demurred to the complaint: First, for want of jurisdiction of the court of the subject of the action and over the person of the defendant; second, for improper joinder of two causes of action; third, for failure to state facts sufficient to constitute a cause of action. The demurrer was sustained upon the ground that it appeared from the facts set forth in the complaint, that plaintiff was entitled to hold the leased premises for an additional term, by extension of the old lease under the agreement for renewal, and was not entitled to a new lease. Defendant Kaiser answered, setting up facts entitling him to relief against

his grantor on the covenant in his deed by an abatement of the amount of purchase money secured by the mortgage, to the extent of the damages that would result to him from the plaintiff's claim for a renewal of the lease, if such claim prevailed against defendant Scribner. Defendant Scribner moved the court to strike out that part of the answer constituting, or attempting to set up, a cause of action against her. The motion was denied and the court ruled that the answer stand as a cross complaint by defendant Kaiser against his co-defendant. Thereafter such co-defendant demurred to the so-called cross complaint: First, for want of jurisdiction of the person of defendant and the subject of the action; second, that several causes of action were improperly joined; third, for failure to state facts sufficient to constitute a cause of action; fourth, for insufficiency as a counter-claim or cross complaint. The demurrer was overruled, and exception to the ruling was duly taken. * * *

MARSHALL, J.: * * *

* * * * * * * * * * *

On the appeal of defendant Mary L. Scribner, from the order overruling her demurrer to the answer of defendant Kaiser, which answer is termed a cross bill, the chief contention is that the demurrer reached back to the first pleading, i. e., the complaint of the plaintiff, and should have been sustained upon the same ground as that upon which the demurrer of defendant Kaiser to such complaint was sustained; that the complaint failing, the cross bill, so called, was carried down with it. We having held that the demurrer to the complaint was improperly sustained, the point upon which, as stated, appellant Scribner chiefly relies, is no longer necessarily in the case for a decision. But as the question of practice is here, is important, and may have some future bearing on the disposition of the case, we have determined to decide it on account of such probable future bearing on this litigation, and as a guide in future cases as well.

The framers of the code clearly intended to abolish all distinctions between actions at law and suits in equity, to abolish the forms of all such actions, and to provide that, in this state, there shall be but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which is denominated a

civil action. Rev. St. § 2600. So it is not left for the courts to invent new forms of action in that regard, or use old forms, except as preserved in some way by the code. Generally, all persons having an interest in the subject of an action, and in obtaining the relief demanded, may be joined as plaintiffs. Id. § 2602. And any person may be made a defendant who has, or claims to have, an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein. Id. § 2603. Also, any person whose presence is necessary to a complete determination of the controversy, and any person having such an interest in the subject-matter of the controversy as requires his presence for his due protection, may be made a party. Id. § 2610. So the code is quite as broad as the old practice, so far as relates to parties plaintiff and defendant. Now as to pleading, it provides that the forms of pleading for civil actions, and the rules by which the sufficiency of the same are determined, are those prescribed by the statute (Id. § 2644); that the first pleading on the part of the plaintiff shall be the complaint (Id. § 2646); that the first pleading on the part of the defendant shall be a demurrer or answer, and that the answer may contain a general or specific denial of such material allegations of the complaint, controverted by the defendant, or a statement of new matter constituting a defense or counterclaim to the cause of action set forth in the complaint. Id. § 2655. To the answer the plaintiff may demur to the defensive part, and may reply or demur to the counterclaim. That seems to compose the whole scheme for forming issues and presenting questions for determination in all actions, whether heretofore denominated legal or equitable, so far as expressly provided for. It is said that the counterclaim of the code was intended to preserve to a defendant all remedies he formerly had, either in an action at law or by a bill in equity, or a cross bill on similar facts. 2 Wait, Prac. p. 476, and cases cited. Said BOSWORTH, J., in *Gleason v. Moen*, 2 Duer, 639: "The counterclaim secures to the defendant full relief, which a separate action at law, or a bill in chancery, or a cross bill, could have secured to him on an allegation or proof of the same facts, but it relates to only such causes of action as exist against the plaintiff, and might, in their nature,

be the basis of an action against him at the suit of the defendant."

Van Santvoord, in his work on Pleadings (page 574), after discussing generally the purposes of the cross bill under the old practice, says: "All these various matters which, under the equity practice, were proper subjects of a cross bill when the object was for relief and not discovery, are supposed to be within the term 'counter-claim,' as used in the code, and may be set up by the defendant in the action. A cross bill was sometimes necessary in adjusting equities between the defendants, as where the court could not make a complete decree without bringing other matter before the court to be litigated by the proper parties and upon the proper proofs. In such cases it became necessary for one or more of the defendants to file a cross bill. This, in a proper case, under the code, it seems may also be done by an answer." The same writer, in his work on Equity Pleading, touching the same subject, uses language indicating that in his opinion the cross bill of the old practice is retained under the code for some purposes. The cases he cites, however, all treat the pleading as the answer of the code, as, for example, *Bogardus v. Parker*, 7 How. Prac. 305, where the pleading was an answer claiming affirmative relief on appropriate allegations of facts, and the court said, in effect that on such a pleading, under the statute, the court could determine ultimate rights between co-defendants and enter the appropriate judgment. The author cites the same cases in his work on Pleading, to support the text there that the relief formerly obtainable by cross bill is obtainable under the code by answer, setting up the facts and claiming such relief. That is in accord with Baylies on Pleading under the New York Code (page 277), citing provisions of such code, hereafter mentioned. Wait, on the same subject (volume 2, p. 476), says: "While there are cases in New York that intimate that cross bills in some cases are necessary, nowhere is it expressly decided that a resort to cross pleading under the code is allowable or proper, or that there can be any case of a failure of justice, resulting from an inability to interpose them."

The apparent uncertainty in the practice, to which reference was made in the last quotation, was subsequently remedied by a statute which did not provide for any ad-

ditional pleadings, but regulated the practice so as to make the code pleadings more certainly fit the necessities of all cases. In *New York Security & Trust Co. v. Saratoga Gas & Electric Light Co.* (Sup.) 34 N. Y. Supp. 890, HERRICK, J., speaking on the same subject, said, in effect, that the cross action, with the forms of procedure relative thereto, no longer exists; that the forms of pleading in all actions are prescribed by the code, and that alone.

Without further reference to authorities, we think there can be no escaping the conclusion that cross bills, strictly so called, were done away with by the code. Nevertheless, all the remedies of the old practice are preserved and intended to be worked out through the forms of pleading which the code prescribes. As we have shown, any person interested in the controversy, adverse to the plaintiff, or necessary to a complete determination or settlement of the questions involved therein, or so interested in the subject-matter of the controversy as to require his presence for his due protection, is a necessary or a proper party defendant, hence entitled to plead and to set forth by the pleading the facts warranting the relief which the court has jurisdiction to grant. The scope of the pleading must necessarily be broad enough to present all the questions which the court may properly decide in the action, and settle by its decree, including any controversy between parties defendant, which the court can determine without prejudice to the rights of others or by saving their rights. Rev. St. § 2610. "Judgment may be given for or against one or more of several defendants, and it may determine the ultimate rights of the parties on each side, as between themselves, and may grant to the defendant any affirmative relief to which he may be entitled," etc. Id. § 2883. So the relief that may be obtained in the action is quite as broad as under the old practice.

It follows, necessarily, that a defendant who seeks affirmative relief against a co-defendant, cannot obtain it under a counterclaim, strictly so called, because that is a proper pleading only as against the plaintiff. So it is clear that the code is deficient in respect to providing for the necessary pleadings upon which to adjudicate the questions that may be settled by the decree, unless the answer of the defendant, who seeks affirmative relief against his co-defendant in respect to a matter germane

to the subject of the action, may be in the nature of a cross bill under the old practice, but a substitute therefor, and the answer of the code, nevertheless. That would seem to be the intent of the framers of the code, and such was the holding in New York before the passage of the law (section 760, Code Civ. Proc.) providing for cross actions, and section 521, Code Civ. Proc., which provides that where the judgment may determine ultimate rights as between defendants, one who requires such determination must demand it in his answer, and must, at least 20 days before the trial, serve a copy of his answer upon the attorney for each of the defendants affected thereby. It is said in the note by the compilers of the code, that this provision was enacted to supply an omission to regulate procedure under section 1204, which is identical with section 2883 of our statutes, relating to the power of the court to settle ultimate rights between co-defendants, and render the proper administration of the law under it certain. The note states that without some provision regulating the practice, the administration of the remedies, under the section to which it refers, was difficult. That came from the fact that a person seeking relief against a co-defendant was entitled, by answer, to set forth all the facts requisite to entitle him to such relief, and was not required by statute to serve his answer upon the defendant affected thereby, and the courts were in conflict as to whether service was required independent of the statute. *Bogardus v. Parker,* 7 How. Prac. 305; *Tracy v. Manufacturing Co.,* 1 E. D. Smith, 349. The reason given by the courts of some states having a code practice, for holding the cross bill of the old practice not done away with by such code, can hardly apply here any more than in New York, from whence our code was taken. Its framers intended to devise a perfect system that would vest in one court power to administer all the remedies, both at law and in equity, which formerly existed, to be worked out in one form of action and with one system of pleading. As said by Mr. Justice HERRICK, in *New York Security & Trust Co. v. Saratoga Gas & Electric Light Co., supra*: "While all remedies, both in law and equity, have been undoubtedly preserved, the method of procedure by which the jurisdiction shall be exercised and the remedies pursued have been entirely changed, and will now

be found in the Code of Civil Procedure and the rules of court."

It follows, without room for reasonable controversy, that the counter-claim of the code, in equitable actions, is a substitute for the cross bill of the former equity practice, where the affirmative relief sought by the defendant is against the plaintiff, and that the provision of law permitting defendants to litigate between themselves matters germane to the subject of the complaint, carries with it the right of the defendant seeking relief in that regard, to serve an answer in the action in the nature of a cross bill, setting up the facts and claiming such relief. Such an answer, however, is essentially a code pleading, and though the court may require it to be served on the defendant affected thereby, such service is not necessary unless so ordered, to preserve the right of the party to have the questions presented by such answer tried and settled by the decree, if the co-defendant affected is before the court.

* * * * * * * * * * *

It follows that a defendant in any case where the court has jurisdiction to grant him affirmative relief, may set up the facts entitling him thereto by answer in the nature of a cross bill, if he is not so circumstanced as to set up the same by way of counterclaim. It is also the proper practice to serve the answer on the defendant affected thereby, and proper for the court, in the exercise of its inherent power, to require such service to be made, and to cause the issues to be narrowed and sharply presented for adjudication, by requiring the defendant, against whom relief is sought, to plead to the answer setting up the cross demand. Such was the practice in this case, and the fact that the court saw fit to designate the pleading of the defendant Kaiser a cross bill, or cross complaint, did not change it. The pleading was authorized by the code, it was really the substitute for the cross bill under the old practice, and whether it be called a cross complaint, or cross bill, or answer in the nature of a cross bill, makes very little difference.

It is considered that the matter contained in the answer was germane to the subject of the action, hence properly pleadable, and it remains to be seen what the effect is of a dismissal of a complaint upon the answer of a defendant seeking to obtain relief against a co-defendant, for matters

not pleadable themselves as a cause of action in equity. There being no statute on the subject, providing for retaining the case in such a situation for the purpose of settling the ultimate rights of co-defendants between themselves, the proper practice to be followed is that which formerly existed, that is, the answer of the defendant falls with the complaint and the entire action is at an end. Under the old practice, though the court would retain a case to determine the questions raised by the cross bill claiming affirmative relief as between the defendant and the plaintiff, where the cause of action in such a bill was equitable in its nature, the rule was otherwise where the relief sought thereby could be obtained by legal remedies. The reason for that rule applies with greater force as between co-defendants. Here the relief sought by defendant *Kaiser's* answer was an abatement of the debt due to his grantor by way of an assessment of damages for breach of the covenants in his deed. That was a matter for which there was an adequate remedy at law, and could not be settled in an equitable action other than as auxiliary to an equitable action to which it was germane, or in some way connected, so as to bring the defendant before the court as a party on that account. So, as the case stood before the trial court, the dismissal of the complaint for failure to state a cause of action in equity, properly carried the answer of defendant *Kaiser* with it on the demurrer of the defendant *Scribner*. Nevertheless, as we hold that the demurrer to the complaint was improperly sustained, such order on plaintiff's appeal must be reversed, and the order overruling the demurrer to the answer sustained.

BY THE COURT. So ordered, and that the cause be remanded for further proceedings according to law.[1]

[1] See Joyce v. Growney (1899), 154 Mo. 253, 264, for a brief expression of somewhat similar views, the court emphasizing the limitations under which relief may be had against a co-defendant in the following language: "The statute limits the new matter that may be pleaded in the answer to that which is a defense to the plaintiff's suit or else a counter-claim against him; it does not authorize a counter-claim or an equitable cross action of one defendant against another except as one defendant may be entitled to such relief against another as will enable him to make good his defense to the plaintiff's suit. Whatever affirmative relief one defendant may have as against another must be of a character responsive to the plaintiff's suit."

In Hill v. Frink (1895), 11 Wash. 562, the name "cross-complaint" was not objected to, but its dependent nature, as responsive to the case made by the plaintiff's complaint, was strongly insisted upon. The court said: "While it is true that the court may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves

(Code Proc. § 407), and that one defendant may, by cross-complaint, in a proper case, seek affirmative relief from a co-defendant, it is also true that the cause of action stated in the cross-complaint must arise out of, or relate to, the subject matter of the original action. Bliss, Code Pleading (3rd Ed.), § 390, and cases cited."

Statutes expressly authorize cross-complaints against co-defendants or third parties, in several states. *Arkansas*, Kirby's Digest, 1904, § 6088; *California*, Code Civ. Pro., § 442; *Idaho*, Rev. Codes, 1908, § 4188; *Iowa*, Code, 1897, § 3574; *Kentucky*, Code, 1895, § 96, sub-div. 3; *Utah*, Comp. Laws, 1907, § 2974.

SECTION 7. EQUITABLE DEFENSES.

EAST v. PEDEN.

Supreme Court of Indiana. 1886.

108 Indiana, 92.

MITCHELL, J. The questions presented for decision in this case arise upon the following facts: On the first day of April, 1855, Thomas Shepherd died intestate, seized of certain real estate in Greene county, leaving as his only heirs his widow, Rebecca Shepherd, and Lealdus Shepherd, a son. The widow and son inherited the land in equal moities, as tenants in common. On the twenty-fourth day of August, 1857, while yet the widow of her deceased husband, Rebecca Shepherd made a conveyance by which she intended to convey to Eli Adams her interest in the real estate which she inherited from her husband, but which conveyance, through an alleged mistake in the description, did not embrace any of the lands in controversy. This deed recites that it was made upon a consideration of $200. It was duly recorded. On August 30, 1857, six days after the deed was made, Rebecca Shepherd intermarried with John East, and, remaining in possession meanwhile, on the nineteenth day of January, 1865, during her second marriage, she and her husband joined in a quitclaim deed for her interest in the land to Hughes East, who in the same year conveyed to the appellee. From that time forth the appellee has been in possession.

Treating the conveyance made during her second marriage as void, within the prohibition of the statute concerning the alienation of real estate held in virtue of a

previous marriage during a second or subsequent marriage, Rebecca East commenced this suit against the appellee in the Greene circuit court, to recover possession of the undivided one-half of certain described lands. The complaint was in the usual form for the recovery of real estate, and the issue was made by an answer of general denial.

That the appellee took no title through the deed made to Hughes East during the appellant's second marriage is conceded on all hands. He had judgment below, nevertheless, upon the theory that it was competent for him to show title out of the plaintiff, by proving that Adams was the equitable owner of the land in controversy through the deed made in 1857, by which it was claimed the appellant intended to convey her interest to him notwithstanding the land in dispute was not described in that deed.

By exceptions to the admission of evidence, and otherwise, the questions presented for decision may be comprehended under the following propositions: (1) Admitting the validity of the defense upon which the appellee prevailed in the court below, was it competent to make such defense under the general denial, without an answer or other pleading asking affirmative relief? (2) The appellee being in no wise in privity with, and having asserted no claim under, the deed to Adams, in which the alleged misdescription was found, was he in a situation to show the mistake, and avail himself of that deed as a defense, by any method of pleading which he might have resorted to?

Respecting pleadings in actions for the recovery of possession of real property, section 1055, Rev. St. 1881, enacts that "the answer of the defendant may contain a denial of each material statement or allegation in the complaint, under which denial the defendant shall be permitted to give in evidence every defense to the action that he may have, either legal or equitable." As to what constitutes an equitable defense, the better view, and that supported by the weight of authority, seems to be that any state of facts which would entitle the defendant, in a proper case, to the reformation of an instrument, or which would, under the former practice, if set up in a bill for that purpose, invoke the aid of a court of chancery for relief against the claim or title put forward by the plaintiff, would be

a defense coming within that definition. In cases where it is necessary to plead an equitable defense in order to make it available, such defense may be pleaded to bar the plaintiff's right of recovery, without asking affirmative relief, while in actions such as this, governed by section 1055, above set out, equitable defenses are available under the general denial. Under a statutory denial, any facts which show that, according to the principles of equity, as applied by courts of chancery, the plaintiff ought not to recover possession of the land in controversy, may be given in evidence to defeat a recovery. Sedg. & W. Tr. Title Land, §§ 477-488; Pom. Rem. §§ 90, 91, and notes; *Hoppough v. Struble,* 60 N. Y. 430; *Cavalli v. Allen,* 57 N. Y. 508; *West v. West,* 89 Ind. 529; *Schenck v. Kelley,* 88 Ind. 444; *Berlin v. Oglesbee,* 65 Ind. 308; *Steeple v. Downing,* 60 Ind. 478-481; *Hogg v. Link,* 90 Ind. 346.

There are cases which seem to lend some support to the view contended for by the appellant, to the effect that an equitable defense, predicated on a mistake in a written instrument, and other defenses of a like character, can only be made available as such by an answer or pleading in which affirmative relief is prayed for. *Conger v. Parker,* 29 Ind. 380; *King v. Enterprise Ins. Co.,* 45 Ind. 43-59.

These cases, while bearing some analogy in principle, are not entirely applicable to the case under consideration. Moreover, it may be doubted whether the construction which was given the statute authorizing equitable defenses, in the cases cited, was not too strict to subserve the purposes of the code. Affirmative relief is attainable by a defendant in all proper cases, and, when derived, it can only be afforded through the medium of an answer or other pleading, in the nature of a cross-complaint, in which such relief is prayed for. *Crecelius v. Mann,* 84 Ind. 147; *Emily v. Harding,* 53 Ind. 102. But a defendant is not compelled to become an actor, and ask affirmative relief by way of counter-claim. He may rely upon the facts, as an equitable defense, to defeat his adversary's claim.

In respect to the first inquiry, we may say, if the facts upon which the appellee relied had been otherwise available as a defense, they were properly admitted under the general denial.

In respect to the second inquiry, counsel for appellee build an ingenious argument in support of the ruling of

the court below in admitting evidence to show a mistake in the deed from the appellant to Adams, upon the ancient common-law rule now embodied in section 1057 of the code, which requires the plaintiff in ejectment to recover on the strength of his own title, and not upon the want of title in the defendant. That the plaintiff in such an action must, as a general rule, show a legal title, with a present right of possession paramount to the title of the defendant, and that the latter may avail himself of any imperfection in the title of the former, or that he may, unless estopped, defeat the action, by proving a subsisting outstanding title in a third person with which the defendant is not connected, are well-settled and often reiterated general principles. These principles, however, all come short of the real emergency in the appellee's situation. No outstanding legal title having been made to appear, the question is, can he avail himself of an alleged outstanding equity in favor of an indifferent stranger, with whom he stands in no sort of legal privity? The outstanding equity in a third person which will afford a shelter for a defendant in possession, without title, against a legal title in the plaintiff, must be such an equity as the defendant would have the right, by making proper parties, to invoke the aid of a court of chancery to enforce in his favor. Unless he is so far connected with the equitable right of a third person, the defendant must leave the parties between whom the legal and equitable titles subsist to adjust their rights between themselves.

The doctrine which the authorities support is that an outstanding title with which the defendant is not connected, and through which he makes no claim, must, in order to be available to protect his possession, appear to be a present, subsisting, operative legal title, upon which the owner could sue and recover. *Bennett v. Horr,* 47 Mich. 221; S. C. 10 N. W. Rep. 347; *Shields v. Hunt,* 45 Tex. 424; *McDonald v. Schneider,* 27 Mo. 405; Sedg. & W. Tr. Title Land, § 831; Tyler, Ej. & Adv. Inj. 72.

So far as appears, Adams never set up any claim to the land in controversy under the deed in which the appellee was permitted to show a mistaken description. The grantee in that deed remained for more than 20 years, and still continues, satisfied with the description as it is. Since the appellee claims no right through the deed in question, he is

in no position to assert a mistake, and seek a correction of the deed, so long as the parties to the instrument are content with the description therein written. In all cases of mistake in written instruments, courts of equity will interpose their aid between original parties, or those claiming under them in privity, but on behalf of persons not thus connected, courts of chancery do not lend their aid. *White v. Wilson,* 6 Blackf. 448; *Sample v. Rowe,* 24 Ind. 208; *Morris v. Stern,* 80 Ind. 227.

The judgment is reversed with costs, with directions to the court below to sustain the motion for a new trial.[1]

[1] *Accord,* on the point that an equitable defense may be set up as a pure defense, merely negativing the plaintiff's claim without entitling the defendant to affirmative relief. Dale v. Hunneman (1881), 12 Neb. 221.

DEWEY v. HOAG.

Supreme Court of New York. 1853.

15 Barbour, 365.

This was an action to recover the possession of the undivided third part of a lot of land formerly owned by Charles Dewey, deceased, late the husband of the plaintiff, of which the complaint alleged he died seised and possessed; the plaintiff claiming to be entitled to an undivided third of said lot, in virtue of her right of dower. * * *

HAND, J.: * * * It is insisted that the answer contains an equitable defense or counterclaim. I do not understand there is any equitable defense or counterclaim. I do not understand there is any equitable defense, simply as a defense in an action of ejectment. The effect of that might be to keep the legal title and the possession forever separate. Under the code as amended, it is said the action may be met by an equitable title of the defendant, and a claim for a conveyance of the legal estate. (Code, secs. 150, 274. *Haire v. Baker,* 1 Seld. 357.) The legislature may have intended, and probably did, to go to that extent; and though the practice will sometimes be embarrassing, and there may be some doubt as to final costs, in many

cases complete justice may be done in one suit. But if that is now the correct practice, to defeat a recovery the defendant must become an actor in respect to his claim; and his answer must contain all the elements of a bill for a specific performance; and he must ask and obtain affirmative relief. The judgment must be for the plaintiff, that he recover the land; or for the defendant, that the plaintiff convey to him, on such terms as the court shall adjudge. A mere judgment for the defendant that the plaintiff take nothing by his action, would not be consistent with the pleadings, for such an answer admits legal title in the plaintiff.[1] * * *

* * * * * * * * * *

[1] *Accord:* Power v. Sla (1900), 24 Mont. 243; Freeman v. Brewster (1897), 70 Minn. 203.

In *Missouri* it seems to be the rule that defendant may or may not ask for affirmative relief, but in the former case the equitable defense converts the case into one in equity triable by the court, while in the latter case it still remains an action at law. O'Day v. Conn (1895), 131 Mo. 321; Swon v. Stevens (1897), 143 Mo. 384; Carter v. Prior (1883), 78 Mo. 222. See, however, Allen v. Logan (1888), 96 Mo. 591.

CHAPTER VI.

THE DEMURRER.[1]

SECTION 1. GENERAL PRINCIPLES.

HANSON v. NEAL.

Supreme Court of Missouri. 1908.

215 Missouri, 256.

LAMM, J.: Plaintiff, beneficiary under a deed of trust covering 1,360 acres of land, more or less, in Ripley county, Mo., and securing an indebtedness of between $2,000 and $3,000, on the 8th day of February, 1905, brought her suit in equity against A. J. O'Neal, sheriff and acting trustee making a sale under said deed of trust, and George A. Neal

[1] THE CODE PROVISIONS ON THIS SUBJECT IN THE VARIOUS STATES ARE AS FOLLOWS:

Alaska. Carter's Ann. Codes, 1900, Code Civ. Pro., § 58.
"The defendant may demur to the complaint . . . when it appears upon the face thereof, either First. That the court has no jurisdiction of the person of the defendant or the subject of the action; or, Second. That the plaintiff has no legal capacity to sue; or, Third. That there is another action pending between the same parties for the same cause; or, Fourth. That there is a defect of parties plaintiff or defendant; or, Fifth. That several causes of action have been improperly united; or, Sixth. That the complaint does not state facts sufficient to constitute a cause of action; or, Seventh. That the action has not been commenced within the time limited by this code."

Arizona. Rev. St., 1901, § 1351.
Identical with Alaska statute, with the exception that 7 reads: "That the cause of action is barred by limitation."

Arkansas. Kirby's Digest, 1904, § 6093.
Same as Alaska statute, omitting the fifth and seventh grounds, the sixth ground under the Alaska act becoming the fifth ground in this provision.

California. Kerr's Codes, Civ. Proc., 1909, § 430.
"The defendant may demur to the complaint . . . when it appears upon the face thereof, either: 1. That the court has no jurisdiction of the person of the defendant or the subject of the action; or, 2. That the plaintiff has not legal capacity to sue; or, 3. That there is another action pending between the same parties for the same cause; or, 4. That there is a defect or misjoinder of parties plaintiff or defendant; or 5. That several causes of action have been improperly united; or, 6. That the complaint does not state facts sufficient to constitute a cause of action; or, 7. That the complaint is ambiguous, unintelligible, or uncertain."

and Thomas F. Lane, purchasers at such trustee's sale, the object and general nature of which was to set aside the sale and the deeds made to them. * * *

* * * * * * * * * * *

Defendants demurred to the bill on the grounds: (a) That by the showing made plaintiff is not entitled "to the recovery or relief prayed by the bill against these defendants." * * *

The demurrer was overruled. * * *

Under the code, a demurrer must specify the grounds of objection. Rev. St. 1899, § 599 (Ann. St. 1906, p. 627). The sixth statutory ground of demurrer (section 598, supra) is: "That the petition does not state facts sufficient to con-

Colorado. Rev. St., 1908, Code Civ. Pro., § 56.
Same as California statute, *supra.*

Connecticut. Gen. St., 1902.
No enumeration of grounds.

Idaho. Rev. Codes, 1908, § 4174.
Identical with the provisions of the California code.

Indiana. Burn's Ann. St., 1908, § 344.
"The defendant may demur to the complaint when it appears upon the face thereof, either: *First.* That the court has no jurisdiction of the person of the defendant or the subject of the action. *Second.* That the plaintiff has not legal capacity to sue. *Third.* That there is another action pending between the same parties for the same cause. *Fourth.* That there is a defect of parties, plaintiff or defendant. *Fifth.* That the complaint does not state facts sufficient to constitute a cause of action. *Sixth.* That several causes of action have been improperly joined. And for no other cause shall a demurrer be sustained."

Iowa. Code, 1897, § 3561.
Identical with the Indiana statute, with the following substituted for the sixth ground: "6. That the petition, on the face thereof, shows that the cause of action is barred by the statute of limitations; or fails to show it to be in writing, when it should be so evidenced; or, if founded on an account or writing as evidence of indebtedness, that neither such writing or account of copy thereof is incorporated into or attached to the pleading, or a sufficient reason stated for not doing so."

Kansas. Gen. Stat., 1909, § 5686.
"The defendant may demur to the petition only when it appears on its face, either: *First.* That the court has no jurisdiction of the person of the defendant, or the subject of the action. *Second.* That the plaintiff has no legal capacity to sue. *Third.* That there is another action pending between the same parties for the same cause. *Fourth.* That the petition does not state facts sufficient to constitute a cause of action."

Kentucky. Carroll's Code, 1895, §§ 92, 93.
Same as California statute, *supra,* omitting the fifth and seventh grounds there enumerated, and adding the words "in this state" after the word "pending" in subdivision 3.

Minnesota. Rev. Laws, 1905, § 4128.
Similar to California statute, *supra,* omitting the seventh ground.

Missouri. Ann. Stat., 1906, § 598.
"The defendant may demur to the petition, when it shall appear upon the

stitute a cause of action." From my individual viewpoint, the demurrer in question does not with certainty make that specification. Its grounds are * * * "That it appears by the plaintiff's own showing by said bill that she is not entitled to the recovery or relief prayed by the bill against these defendants."

In technical pleading, technicalities count. For is it not written that he that taketh the sword may perish by the sword? It has been held that the use of the statutory language of the sixth ground of demurrer is a sufficient specification. In this instance, the pleader's language, liberally construed, may mean the same as the statutory language,

face thereof, either: First, that the court has no jurisdiction of the person of the defendant, or the subject of the action; or, second, that the plaintiff has not legal capacity to sue; or, third, that there is another action pending between the same parties, for the same cause, in this state; or, fourth, that there is a defect of parties plaintiff or defendant; or, fifth, that several causes of action have been improperly united; or, sixth, that the petition does not state facts sufficient to constitute a cause of acion; or, seventh, that a party plaintiff or defendant is not a necessary party to a complete determination of the action."

Montana. Rev. Codes, 1907, § 6534.
Identical with California statute, *supra.*

Nebraska. Comp. Stat., 1911, § 6668.
Same as California statute, *supra,* omitting the seventh ground, and the words "or misjoinder" after the word "defect" in sub-division 4.

Nevada. Comp. Laws, 1900, § 3135.
Identical with California statute, *supra.*

New Mexico. Comp. Laws, 1897, § 2685, sub-sec. 35.
Same as Missouri, with the word "territory" substituted for the word "state" in sub-division 3.

New York. Chase's Code Civ. Proc., 1910, § 488.
"The defendant may demur to the complaint, where one or more of the following objections thereto appear upon the face thereof: 1. That the court has not jurisdiction of the person of the defendant. 2. That the court has not jurisdiction of the subject of the action. 3. That the plaintiff has not legal capacity to sue. 4. That there is another action pending between the same parties, for the same cause. 5. That there is a misjoinder of parties plaintiff. 6. That there is a defect of parties, plaintiff or defendant. 7. That causes of action have been improperly united. 8. That the complaint does not state facts sufficient to constitute a cause of action."

North Carolina. Rev. of 1905, § 474.
Same as Indiana statute, *supra,* changing the order of sub-divisions 5 and 6.

North Dakota. Rev. Codes, 1905, § 6854.
Same as Indiana statute, *supra,* changing the order of sub-divisions 5 and 6.

Ohio. Gen. Codes, 1910, § 11309.
Same as New York statute, *supra,* adding the words "or defendant" after the word "plaintiff" in sub-division 5, and the following additional grounds: "8. That separate causes of action against several defendants are improperly joined; 9. That the action was not brought within the time

and then again may not. The object of the statute was to sharply direct the trial court's mind to the precise ground of objection relied on. This, to treat the trial court fairly and subserve the will and purposes of the statute. Rev. St. 1899, § 864 (Ann. St. 1906, p. 808). It is well, therefore, in demurring, to be plain about the grounds, to keep within the statutory way, as a beaten path. * * *

* * * * * * * * * *

limited for the commencement of such actions;" making the eighth ground under the New York code, sub-division 10.

§ 11324 enumerates the grounds of demurrer to counter-claim or set-off.

Oklahoma. Comp. Laws, 1909, § 5629.
Same as Alaska statute, *supra*, with the seventh ground there enumerated absent.

Oregon. Lord's Laws, 1910, Code Civ. Pro., § 68.
Identical with Alaska statute, *supra*.

South Carolina. Code of Laws, 1902, § 165.
Same as Alaska statute, *supra*, with the seventh ground there enumerated absent.

South Dakota. Rev. Codes, Civ. Proc., 1903, § 121.
Same as Alaska statute, *supra*, with sub-division 7 absent.

Utah. Comp. Laws, 1907, § 2962.
Identical with California statute, *supra*.

Washington. Rem. & Ball. Codes, 1910, § 259.
Substantially identical with the Alaska statute, *supra*.

Wisconsin. Stat., 1898, § 2649.
Substantially identical with the Alaska statute, *supra*.

Wyoming. Comp. Stat., 1910, § 4381.
"The defendant may demur to the petition only when it appears on its face either: 1. That the court has no jurisdiction of the person of the defendant, or the subject of the action; 2. That the plaintiff has no legal capacity to sue; 3. That there is another action pending between the same parties for the same cause; 4. That there is a misjoinder of parties plaintiff; 5. That there is a defect of parties, plaintiff or defendant; 6. That several causes of action are improperly joined; 7. That separate causes of action against several defendants are improperly joined; 8. That the petition does not state facts sufficient to constitute a cause of action."

MINNICH v. PACKARD.

Appellate Court of Indiana. 1908.

42 Indiana Appellate, 371.

WATSON, J.: To the complaint in this cause appellee appeared specially and filed an answer in abatement, denying the jurisdiction of the court, alleging that he was a resident of the city of Buffalo, state of New York; that he came

to Huntington, Ind., for the sole purpose of prosecuting an action in replevin, brought by himself against said appellant in the Huntington Circuit Court, and to testify in his own behalf in said cause; that his presence was necessary on the trial of said cause; that during the progress of said trial, and while he was in the courtroom, appellant filed his complaint in this cause and caused summons to be issued and served on appellee; that the answer in said first cause, wherein appellee was plaintiff and appellant was defendant, was so drawn that it would require appellee to attend the trial thereof. Issues were joined thereon and the cause submitted to a jury. The jury, with their general verdict, returned answers to interrogatories submitted to them.

The errors assigned were: (1) Overruling the demurrer to appellee's answer in abatement. * * *

To appellee's plea in abatement appellant filed his demurrer, which, omitting the caption, is as follows: "Plaintiff demurs to defendant's answer of abatement on the ground that said answer does not state facts sufficient to constitute a cause why plaintiff should not be allowed to prosecute this action in this court." It is insisted that the demurrer is not in proper form, and therefore presents no question as to the sufficiency of the answer. Burns' Ann. St. 1901, § 349 (Burns' Ann. St. 351), provides: "Where the facts stated in any paragraph of the answer are not sufficient to constitute a cause of defense, the plaintiff may demur to it under the rules prescribed for demurring to a complaint."

In *Reed v. Higgins*, 86 Ind. 143, the demurrer was: "The plaintiffs separately and severally demur to the second, third, and fourth paragraphs of defendant's answer herein, and for ground of demurrer say that neither of said paragraphs constitute any defense to this action." Held, the demurrer was insufficient.

In *Thomas v. Goodwine*, 88 Ind. 458, the demurrer to the first paragraph of the answer was for the following cause: "Because said defendant's answer does not state facts sufficient to constitute an answer to plaintiff's complaint." Held insufficient.

In *Wintrode v. Renbarger*, 150 Ind.. 556, the demurrer was for the reason that facts were not stated "sufficient to constitute a good answer to the complaint of the plaintiff." The demurrer was held bad. A demurrer to a plea in abate-

ment is sufficient in form if it alleges that the answer does not state facts sufficient to abate the action, or state facts sufficient to constitute a defense. * * *

The court, therefore, committed no error in overruling the appellant's demurrer to the answer in this cause.[1]

* * * * * * * * * * *

[1] In Mader v. Plano Mfg. Co. (1903), 17 S. D. 553, the court said: "Under the prevailing system, it is universally held that when the causes for which parties may demur are fixed by statute the causes specified therein are exclusive and no other ground is tenable."

In Dodge v. Colby (1888), 108 N. Y. 445, the court said: "It is quite true that, under section 484 of the Code of Civil Procedure, causes of action for slander cannot properly be joined with actions for injuries to real property; but this was not the ground of objection stated in the demurrer. The ground there specified was that a cause of action of a transitory nature, of which the court had jurisdiction, had been united with one for trespasses upon land in another state, of which the court had no jurisdiction. This is not one of the grounds of demurrer authorized by the code. It is a proper ground of demurrer that the court has not jurisdiction of any specified cause of action, but this does not authorize a demurrer, upon the ground that such causes of action are united with one of which it has jurisdiction."

In State ex rel. v. Huff (1909), 172 Ind. 1, a demurrer to an answer stating that "neither of said paragraphs of answer contain facts sufficient to constitute an answer to plaintiff's complaint and information" was held to present no question. See, for other illustrations, Oglebay v. Tippecanoe Loan & Trust Co. (1907), 41 Ind. App. 481.

HELM AND SON v. BRILEY.

Supreme Court of Oklahoma. 1906.

17 Oklahoma, 314.

GILLETTE, J. This was an action on a promissory note, as stated above. To the petition of plaintiff setting forth said note, a general demurrer was filed, which was overruled. * * *

A second proposition presented by the plaintiff in error is that the suit was brought against A. Helm & Son when it should have been brought against A. Helm and W. S. Helm as copartners under the firm name of A. Helm & Son, and upon this proposition it is urged that the court erred in overruling the demurrer to the petition. As before stated the demurrer was general, and this ground we think could not be taken under a general demurrer. If there was a defect of parties defendant the demurrer should have so

specified, as the statute makes that a ground of demurrer, and further provides as follows:

"The demurrer shall specify distinctly the grounds of objection to the petition."

It is not sufficient to demur generally to a pleading, and under such demurrer to undertake to raise a question of jurisdiction, legal capacity, another action pending, or defect of parties.

Under the requirement of the statute that the demurrer shall specify distinctly the grounds therefor, it is not sufficient to demur upon one statutory ground and undertake to rely upon a different ground.

The rights of the parties upon demurrer will be adjudged only upon the grounds laid. All other grounds must be held to have been waived, and in this instance any supposed right to object to the sufficiency of the petition because of a defect of parties is waived because of a failure to specify that as a ground of demurrer.[1]

* * * * * * * * * * *

[1] On a demurrer for want of facts to constitute a cause of action, defendant cannot avail himself of a want of jurisdiction. Woods v. Sheldon (1896), 9 S. D. 392.

HENDERSON v. JOHNS.

Supreme Court of Colorado. 1889.

13 Colorado, 280.

* * * * * * * * * * *

The above complaint was demurred to by the defendant Henderson for the following reasons: "(1) That said complaint does not state facts sufficient to constitute a cause of action; (2) that there is a misjoinder of parties defendant to this action; (3) that several causes of action have been improperly united in this action."

Mr. Justice HAYT delivered the opinion of the court.

The causes of demurrer in this case are assigned in the language of section 49 of the Civil Code, without any specification of the particular defects relied upon to support the same; and we are asked, as a preliminary question, to pass upon the sufficiency of the statement of the second and

third causes of demurrer to raise any question for the court to pass upon. Generally, such defects as are made causes of demurrer must be taken advantage of in that manner, if they appear upon the face of the complaint, and, if they do not so appear, then by answer; otherwise they are treated as waived. But if the complaint fail to state facts sufficient to constitute a cause of action, or if it appear that the court is without jurisdiction, the defect is so radical that the defendant is allowed to take advantage thereof at any time; and it has been held that those defects may be assigned in the language of the statute. With these exceptions, the particular defect in the pleading must be distinctly pointed out, in order that advantage may be taken thereof by demurrer. In other words, "when a cause of demurrer is assigned, the reason or ground of it must be stated." This was the established rule in California, from which state our code is largely borrowed. *Brown v. Martin*, 25 Cal. 82; *Kent v. Snyder*, 30 Cal. 666.

By a familiar rule of construction, by taking this statute our legislature will be held to have adopted it as construed at that time by the court of last resort in the state from which it was taken. This construction is also in harmony with the general practice in the trial courts of this state as it has existed for many years; and the established rule in reference to mere matters of practice ought not to be lightly cast aside by the courts, but should ordinarily be adhered to until changed by legislation. Tested by these principles, we must hold the statement of the second and third causes of demurrer insufficient, and they will therefore be disregarded.[1]

* * * * * * * * * * *

[1] *In Iowa* the code expressly requires a general demurrer in an action at law to point out specifically wherein the facts alleged are insufficient to constitute a cause of action, though such a demurrer in an equitable action is sufficient in the words of the statute. Slafter v. Concordia Fire Ins. Co. (1909), 142 Iowa 116.

McCALL COMPANY v. STONE.

Supreme Court of Wisconsin. 1905.

124 Wisconsin, 572.

WINSLOW, J.: By the separate defense at which the plaintiff's demurrer was directed, the defendant endeavored to plead facts which would make the contract sued upon invalid under the provisions of section 1770b, Rev. St. 1898. Had the plaintiff demurred to that defense, the question whether that section applied to the contract set forth by the complaint, or whether that contract was unaffected by the section because it relates to commerce between the states, would have been fairly before us. The plaintiff, however, demurred to a part only of the defense. It eliminated certain paragraphs of the alleged defense and demurred to the balance. If this method of pleading be allowable, the pleader who could not frame a successful demurrer to almost any pleading would be a very dull man. All that would be necessary would be to pick out the paragraphs which by themselves state no cause of action or defense, and demur to them. However, such is not the law. The statute (section 2658 Rev. St. 1898) says, "The plaintiff may * * * demur to the *answer* or *any defense* therein when," etc. This court has held that a demurrer cannot be addressed to a fragmentary part of a pleading, even in a mandamus action, where the statute allows the relator to "demur or answer all or any of the material facts contained in the same return." *State ex rel. v. Chittenden*, 107 Wis. 354, 83 N. W. 635.

These considerations make it improper for us to consider whether the alleged defense constitutes in fact a defense, for the reason that, as a whole, it has never been challenged.

Order affirmed.[1]

[1] *Accord:* Plymouth Gold Mining Co. v. U. S. Fidelity & Guaranty Co. (1907), 35 Mont. 23; Miles v. Charleston Light & Water Co. (1910), 87 S. C. 254.

FIDELTY AND DEPOSIT COMPANY OF MARYLAND v. PARKINSON.

Supreme Court of Nebraska. 1903.

68 Nebraska, 319.

DUFFIE, C.: * * * A petition was filed in the district court. Plaintiff in error filed an answer which was a general denial, and a demurrer on the ground that the petition did not state facts sufficient to constitute a cause of action. On a trial in the district court, judgment was entered in favor of the defendant in error for $127.70, with interest and costs. The plaintiff in error has brought the case to this court for review.

Section 99 of our Code of Civil Procedure provides that the answer shall contain (1) a general or specific denial of each material allegation of the petition controverted by the defendant, and (2) a statement of any new matter constituting a defense, counter-claim, or set-off, in ordinary, concise language, and without repetition. Section 94 of the Code of Civil Procedure specifies the grounds upon which a demurrer to a pleading may be filed, and it is nowhere intimated that a demurrer to the petition may be set forth in the answer as a part of that pleading. We are aware that it has been the practice in some of the district courts of this state to allow a paragraph in the answer assailing the petition upon the ground that it does not state facts sufficient to constitute a cause of action, but we are not aware of any rule of practice authorized by the statutes of this state which allows a demurrer to the petition to be set forth in the answer, which should only contain a general or specific denial of the allegations of the petition, or a statement of new matter constituting a defense, counter-claim, or set-off to the matters alleged in the petition. If the petition is not sufficient in its statements to require the defendant to answer its allegations, a demurrer should be filed and passed on by the court. If it is insufficient to require an answer, the defendant may stand on his demurrer, but we do not think that it was the purpose of the framers of our code to allow the defendant to set up matters in his

answer which he believes to be a defense thereto, or to plead a counter-claim or set-off, and in the same pleading to question the sufficiency of the petition to state a cause of action against him. If he does not think that the petition states facts which make him liable, he should question its sufficiency by demurrer, and not incorporate it in an answer which alleges other substantial matters of defense to the plaintiff's claim. This view is, we think, fully sustained by section 96 of our code.[1] * * *

* * * * * * * * * * *

[1] The demurrer is deemed waived by an answer to the same matter filed at the same time: Taber v. Wilson (1888), 34 Mo. App. 89; City of Jeffersonville v. Steam Ferryboat (1870), 35 Ind. 19; Fisher v. Scholte (1870), 30 Iowa 221; Ryndak v. Seawell (1904), 13 Okla. 737.

SPRUNT AND SON v. GORDON.

Supreme Court of South Carolina. 1911.

89 South Carolina, 426.

August 10, 1911. The opinion of the court was delivered by

Mr. Justice HYDRICK. This is an action for damages for breach of contract. Plaintiffs allege that defendant made a written contract with them, whereby he sold and agreed to deliver to them, at Gourdins, S. C., between September 15 and October 31, 1909, 25 bales of cotton, to average 500 pounds per bale, 5 per cent. more or less, and they agreed to pay him for it, on delivery, 10 cents a pound for middling cotton, and 10⅛ for strict middling; that they were ready and willing to perform, and demanded performance of him which he failed and refused to do, to their damage $500.

Defendant answered, and afterwards served notice of a demurrer to the complaint for insufficiency, because it is not alleged that plaintiffs tendered defendant the money for the cotton. On plaintiffs' motion, the court ordered defendant to elect whether he would stand on his answer or demurrer. He chose the demurrer, which was overruled, and plaintiffs had judgment on the pleadings.

The court erred in requiring defendant to elect. At common law, it was not allowable to plead and demur to the

same matter at the same time. Nor does the Code of Procedure of 1902 contemplate the filing of both an answer and a demurrer to the same matter at the same time, except as to two of the grounds of demurrer specified therein, to wit, that the pleading fails to state facts sufficient to constitute a cause of action or defense, and that the court is without jurisdiction. Section 164 says that the only pleading on the part of the defendant is *either* a demurrer *or* an answer, which clearly indicates that *both* were not intended to be allowed for the same matter at the same time. It then proceeds to specify the grounds for which a demurrer will lie, and provided, in section 168, that, if the matter enumerated as grounds of demurrer do not appear upon the face of the complaint, the objection may be taken by answer. But section 169 provides that all of the objections specified as grounds of demurrer shall be deemed waived, if not taken either by demurrer or answer, "excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action." There are sound reasons why a party should not be allowed to demur and answer at the same time. The office of a demurrer is to test the sufficiency of a pleading, and, until the pleadings are in proper form, the case is not ready for trial on the merits. To allow a party to answer and demur at the same time tends to confusion and unnecessary expense in the administration of the law; for neither party can tell whether the case will be disposed of on the issue of law, raised by the demurrer, or on the issues of fact raised by the answer. Therefore they are compelled to come to trial prepared to meet both issues; and they may be put to the unnecessary trouble and expense of having their witnesses at the trial when the case will be disposed of on the issue of law raised by the demurrer. It is therefore the better practice, and the intention of the legislature, as indicated in the section of the code above referred to, that the issues of law should be disposed of before the case is set down for trial on the merits. Therefore, when a demurrer is interposed on any of the grounds specified in the code, other than the two above mentioned, and an answer to the merits is also put in at the same time, the court may, in its discretion, require the party to elect upon which he will stand, especially if it appears

that such action will promote the orderly disposition of the cause. *Stahn v. Catawba Mills,* 53 S. C. 519, 31 S. E. 498. Nevertheless, the spirit of the reformed procedure requires that causes be decided on their merits rather than on the technicalities of pleading.

Therefore, when a demurrer is interposed on any ground in good faith, and it is overruled, the party should ordinarily be allowed to answer. Of course, there may be circumstances which would justify the court in refusing to exercise its discretion to allow an answer to be put in after overruling a demurrer, but none such appear in this case.

However, where the statute, expressly or by necessary implication, allows a demurrer and an answer to the same matter at the same time, the court is bound to administer the law as it is written, and it cannot order a party to elect upon which he will stand, and, upon his electing one, strike out the other. There can be no doubt that section 169 of the code contemplates and authorizes the filing of both a demurrer for an insufficient statement of facts and an answer to the merits at the same time. Prior to the amendment of that section by Act March 2, 1903 (24 St. at Large, p. 130), which requires five days' notice of the grounds of such a demurrer, the practice prevailed of entertaining such a demurrer, when made orally at the trial. *Hull v. Young,* 29 S. C. 64, 6 S. E. 938; *Harvey v. Hackney,* 35 S. C. 361, 14 S. E. 822. And it was afterwards regulated by rule 18 of the Circuit Court, requiring the grounds to be reduced to writing, or taken down by the stenographer, under the direction of the court. In *Latimer v. Sullivan,* 30 S. C. 111, 8 S. E. 639, it was held that a plaintiff could at the same time reply and demur to a counter-claim set up in the answer on the ground of insufficiency. It necessarily follows that a defendant can, at the same time, answer a complaint and demur to it for insufficiency, or for want of jurisdiction of the court. The latter ground may be taken at any time—even on the argument of an appeal in this court. *Ware v. Henderson,* 25 S. C. 385.[1]—

* * * * * * * * * * *

[1] See note 1, page 553, *supra.* It is not necessary to adopt the rule here announced in order to secure to parties the statutory protection against implied waiver of objections to the jurisdiction of the court and to the substantial

sufficiency of the pleadings, for the objections might still be raised at the trial, or in arrest of judgment, or on error.

Statutes sometimes expressly permit a party to plead and demur at the same time to the same matter. State ex rel. v. Edwards (1908), 33 Utah 243; Hurley v. Ryan (1897), 119 Cal. 71.

JEFFRIES v. FRATERNAL BANKER'S RESERVE SOCIETY.

Supreme Court of Iowa. 1907.

135 Iowa, 284.

WEAVER, C. J.: Plaintiff brings this action at law upon a certificate of membership issued by the defendant, which is a mutual benefit association, to one Mittie Jeffries. It is alleged that said certificate was issued and Mittie Jeffries admitted to membership in the defendant association on August 29, 1904, and that by the terms of said membership said association undertook and promised upon the death of said member in good standing to pay to the beneficiary named in her certificate the sum of $1,200. It is further alleged that on June 25, 1905, while said Mittie Jeffries remained a member of said association, she died at Cedar Rapids, Iowa, and that thereafter the plaintiff as beneficiary named in said certificate of membership furnished to the defendant association the proper proof of the death of said member, and demanded the payment of the amount therein named to him, but that said payment has been refused, and it denies all liability upon said claim. * * *

* * * * * * * * * * *

To this petition the defendant filed a demurrer, stating as a ground thereof that it appears that the said Mittie Jeffries at the date of her alleged death was not a member in good standing of the defendant association, but, on the the contrary, that her certificate of membership had lapsed and was null and void for the following reasons, to wit: "It appears that Mittie Jeffries by the terms of her contract of insurance was obligated to pay the defendant association the sum of 95 cents per month, and the further sum of 15 cents per month as local dues, which payments, in order to keep the said Mittie Jeffries in good standing,

should have been made in accordance with the by-laws of the defendant company which are attached to and form a part of the plaintiff's petition, and particularly in accordance with sections 100 to 105 of the said by-laws which are as follows:" Here follows what purports to be a copy of the sections or by-laws referred to and set out in full, none of which sections are attached to the petition or pleaded by the plaintiff. * * *

After these quotations from the laws of the association, the demurrer proceeds to say that it appears from the petition that Mittie Jeffries did not pay the dues so owing by her within the time required by the by-laws, and did not furnish a satisfactory certificate of good health which was received and approved by the supreme medical examiner. As a still further ground, it is stated that the petition shows upon its face that the alleged certificate of health furnished by the insured was rejected as insufficient, and returned to her with the dues she had paid, and that, therefore, the furnishing of such alleged certificate of health and the payments of the dues and assessments in arrears did not effect her reinstatement in the association. This demurrer was overruled, and judgment entered by the district court against the defendant upon said certificate of membership for the sum of $862.60.

From the ruling on the demurrer, and from the judgment entered thereon, the defendant appeals.

As will be noted, this case presents a somewhat peculiar aspect. The demurrer by the defendant is made to depend not upon what is alleged or revealed in the pleading demurred to, but upon a statement or recitation of alleged rules and regulations of the society which are embodied in the demurrer itself. These rules and regulations are not in the nature of public laws and statutes of which the courts will take judicial notice. They are issuable facts to be pleaded by the party relying thereon. A demurrer which sets up a ground *de hors* the record, or a ground which to be sustained requires reference to facts not appearing upon the face of the pleading thus attacked, is said to be a "speaking demurrer," and is never held good. *Richardson v. Loree,* 94 Fed. 375, 36 C. C. A. 301; *Clarke v. Land Co.,* 113 Ga. 21, 38 S. E. 323; *Davison v. Gregory,* 132 N. C. 389, 43 S. E. 916; *Elsell v. Buchannan,* 2 Ves. Jr. 83; *Darrow v. Produce Co.* (C. C.) 57 Fed. 463; *Oliver v.*

Powell, 114 Ga. 592, 40 S. E. 826; *Teasley v. Bradley,* 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113; *Stewart v. Masterson,* 131 U. S. 151, 9 Sup. Ct. 682, 33 L. Ed. 114; *Bank v. Leland,* 122 Ala. 289, 25 South. 195. A demurrer cannot be properly sustained unless the objection is apparent on the face of the pleading demurred to. *Elwood v. Baker,* 13 Ind. App. 576, 41 N. E. 1063; *Decourt v. Whitehouse,* 92 Me. 254, 42 Atl. 394; *Goring v. Fitzgerald,* 105 Iowa 507, 75 N. W. 358; *Ruddick v. Marshall,* 23 Iowa 243; *Miller v. Miller,* 63 Iowa 387, 19 N. W. 251; *Polk Co. v. Hierb,* 37 Iowa 361. These rules are so thoroughly settled as to require no explanation or discussion. The demurrer under consideration must, therefore, be treated as if the affirmative matter set up therein were entirely eliminated; that is, as if the alleged sections 100 to 105 of the defendant's rules and by-laws were not in the record. Considered from this standpoint the overruling of the demurrer by the trial court must be sustained. The petition alleges the issuance of the certificate of membership to Mrs. Jeffries and her good standing in the society at the date of her death, and, while it admits that she was at one time in arrears for a few days for non-payment of a monthly installment of dues, it avers that she was duly restored to good standing according to the laws of the society. All this the demurrer must be held to admit, and, defendant having elected to stand upon his admission, there was no error in rendering the judgment appealed from. The record does not distinctly show whether the trial court assigned or relied upon the rules of law above cited as reasons for overruling the demurrer, but this is immaterial. It is the duty of an Appellate Court to affirm a correct judgment, regardless of the correctness of the reasons given for awarding it. See *People v. Lyman,* 157 N. Y. 368, 52 N. E. 132; *Whiting v. Root,* 52 Iowa 292, 3 N. W. 134; *Jamison v. Perry,* 38 Iowa, 14; *Wise v. Wilds,* 77 Iowa 590, 42 N. W. 553.

This conclusion makes it unnecessary for us to consider other questions suggested by the record.

For the reasons stated, the judgment of the district court is affirmed.

SECTION 2. INSUFFICIENT FACTS.

(a) Purpose of General Demurrer.

HALL v. BELL.

Supreme Court of Wisconsin. 1910.

143 Wisconsin, 296.

MARSHALL, J.: This case is governed by a few well established principles. The first of such principles is this: In testing a complaint on a demurrer for insufficiency, the pleading does not necessarily fail because the pleader did not state facts sufficient for the precise cause of action intended, or because he misconceived the precise nature of his cause of action and wrongly denominated it, or because of misapprehension of the nature of the relief warranted by the facts. If the pleading, giving it the benefit of every reasonable inference, expressly or by such inference, or both, states facts showing the plaintiff to be entitled to some relief within the competency of the court to grant, it states a good cause of action for such relief. Such is the liberal rule of the code as early announced (*Morse v. Gilman*, 16 Wis. 504), and many times emphasized and given proper significance in recent years. *Emerson v. Nash*, 124 Wis. 369, 102 N. W. 921; *Bieri v. Fonger*, 139 Wis. 150, 120 N. W. 862; *Loehr v. Dickson*, 141 Wis. 332, 124 N. W. 293. In the most recent case the rule was tersely applied thus:

"A demurrer challenges the sufficiency of the complaint to state any cause of action, and must not be sustained in face of one which does by liberal construction state facts from which any liability results, although not for some or all the damages sought to be recovered."

So it is not necessarily fatal to the complaint in this case because it does not state a good cause of action in equity for rescission of contract, if such be the fact. It should nevertheless have been held good if facts be stated sufficient to warrant some other relief.[1]

* * * * * * * * * * *

[1] *Accord:* Frechette v. Ravn (1911), 145 Wis. 589; St. Croix Consol. Copper Co. v. Musser-Sauntry Land, etc. Co. (1911), 145 Wis. 267; Baker v.

Butte Water Co. (1910), 40 Mont. 583; Solem v. Connecticut Fire Ins. Co. (1910), 41 Mont. 351; Migatz v. Strieglitz (1905), 166 Ind. 361; Basting v. City of Minneapolis (1910), 112 Minn. 306; Mogren v. Finley (1910), 112 Minn. 453; Bell v. Bank of California (1908), 153 Cal. 234; Guerard v. Jenkins (1908), 80 S. C. 223; Otey v. Bradey (1911), 63 Wash. 500.

So, if the facts alleged show the plaintiff to be entitled to nominal damages, a general demurrer should be overruled. Hallstead v. Perrigo (1910), 87 Neb. 128.

(b) What the Demurrer Admits.

DOWNEY v. COLORADO FUEL & IRON COMPANY.

Supreme Court of Colorado. 1910.

48 Colorado, 27.

Mr. Justice BAILEY delivered the opinion of the court:

The complaint is not subject to general demurrer. While it may be that it is liable to motion to make more specific, or to special demurrer, points not decided because not here, objections to be thus raised are not necessarily or ordinarily covered by general demurrer. That is true here. The rule is, if the facts alleged, with all fair and reasonable deductions which may be drawn therefrom, are sufficient to state a cause of action, the complaint must be upheld as against general demurrer. Such is the settled doctrine of this court. *Insurance Company v. Bonner,* 24 Colo. 222. Bearing in mind that all facts, which are material and well pleaded, with all necessary intendments and inferences, are to be taken as true as against a general demurrer, the complaint states a cause of action. A plaintiff is not called upon to anticipate and negative in advance possible defensive matter. The sufficiency of the complaint, when challenged by general demurrer, must be determined from its own averments, unqualified and unaffected by indefinite and uncertain outside considerations and conditions.

The court, therefore, erred in sustaining the demurrer and dismissing the action. The judgment is reversed and cause remanded, with directions to the court below to overrule the general demurrer, with leave to the defend-

ant to move against or plead to the complaint as it may be advised.

Reversed and Remanded.[1]

Chief Justice STEELE and Mr. Justice MUSSER concur.

[1] *Accord:* Roberson v. Rochester Folding Box Co. (1902), 171 N. Y. 538; Malott v. Sample (1904), 164 Ind. 645; Dickerson v. Hamby (1910), 96 Ark. 163; Weber v. Lewis (1910), 19 N. D. 473; Bena Townsite Co. v. Sauve (1908), 104 Minn. 472; McGehee v. Norfolk & Southern Ry. Co. (1908), 147 N. C. 142; Phillips v. Smith (1908), 11 Ariz. 309.

A somewhat stricter rule is frequently announced. Thus, in State ex rel. v. Butte Electric & Power Co. (1911), 43 Mont. 118, the court said: "By interposing a general demurrer to defendant's answer, the relator admitted the truth of its allegations, and, so far as they state probative facts, this court must assume them to be true. But the rule does not extend to mere conclusions of law or inferences from facts not pleaded or conclusions drawn therefrom, even if alleged in the pleading. It includes only facts properly pleaded."

It was held in Diener v. Chronicle Pub. Co. (1910), 230 Mo. 613, that a demurrer in libel does not admit a forced or unfair construction put upon the words by the pleader.

RICE v. RICE.

Supreme Court of Oregon. 1886.

13 Oregon, 337.

LORD, J.: This is a suit for a divorce. The defendant demurred to the complaint upon the ground that the suit had not been commenced within the time prescribed by the statute. The court below overruled the demurrer, and the defendant refusing to further plead, upon motion, a default was taken for want of answer, and the suit referred to take and report the testimony. Upon the report of the referee, the cause was heard by the court, and the decree rendered, from which this appeal is taken.

The error complained of is the overruling of the demurrer. The code provides that the defendant may demur to the complaint when it appears upon the face thereof * * * that the action or suit has not been commenced within the time limited by this code. Code, § 66, sub. 7; Id. § 385. But when the suit is for a divorce, it is provided that "when the suit is for any of the causes specified in subdivisions, 3, 4, 5, and 6 of section 491 the defendant may admit the charge, and show in bar at the suit

* * * that the suit has not been commenced within one year after the right of suit accrued." Code, § 494. The contention of the defendant is that his demurrer is well taken, and in compliance with the requirements of the statute; that it "admits the charge, and directs attention to the complaint, upon the face of which it appears that the suit was not commenced within one year after the right of suit accrued. It is admitted, ordinarily, in actions at law or suits in equity, that, when it appears from the complaint that the action or suit has not been brought within the time limited by the statute of limitations, a demurrer is the appropriate pleading to take advantage of the statute, and bar the action or suit; but in suits for divorce the plaintiff contends that the statute, in its nature, is special and peculiar, and in order for the defendant to avail himself of it he must bring himself within its terms and provisions; that the language of the statute that "he may admit the charge, and show in bar of the suit," etc., means that he must admit the charge as a matter of fact, or of evidence, and not as a technical theory of law, before he can take advantage of it.

The real inquiry, then, is whether a demurrer or answer is the proper pleading to take advantage of the statute. The language of the statute is that "the defendant may admit the charge, and show in bar of the suit," etc.,—that is, admit the truth of the facts charged as facts, and show other facts in bar,—confess and avoid,—and this is precisely what the defendant claims is the effect of his demurrer. To sustain this view, a demurrer must be an absolute admission of the facts demurred to. What does a demurrer admit? In his Treatise on Pleadings Mr. Gould says: "A demurrer to the declaration is not classed among pleas to the action, not only because it may be taken as well to any other part of the pleadings as to the declaration, but also because it neither affirms nor denies any matter of fact, and is not therefore regarded as strictly a plea of any class, but rather an excuse for not pleading." Section 43, *c.* 2. "To demur is to rest or pause." And, again: "A demurrer merely advances a legal proposition,—it forms an issue in law. Admitting the facts so far as well pleaded, for the purpose of taking the opinion of the court preliminarily, its language is: 'Allowing all

that is alleged to be true, there is not anything that calls for an answer, plea, or defense.'" Id. *c.* 9.

In *Pease v. Phelps,* 10 Conn. 62, the court say: "A demurrer presents only an issue in law to the court for consideration; the jury have no concern with it; and although it is a rule of pleading that a demurrer admits facts well pleaded for the sole purpose of determining their legal sufficiency, yet, as a rule of evidence, it was never supposed that a demurrer admitted anything." In *Tomkins v. Ashby,* Moody & M. 32, it was held that a demurrer or plea to a bill in equity does not admit the facts charged in it, so as to be evidence against a defendant, if those facts arise in a future action between the same parties; ABBOTT, C. J., remarking that it was nothing more than saying "that, *supposing* the facts charged to be true, the defendant is not bound to answer."

Mr. Bliss says:

"In denying the legal conclusion from the facts pleaded, the admission of their truth as facts is necessarily implied, and the old rule was stated, substantially, that the truth of a pleading not obnoxious to a general demurrer was admitted; or, more briefly, that a demurrer admitted the facts well pleaded. Thus, if the demurrer is overruled, and the pleading demurred to thus held to be good, unless the demurrer is withdrawn judgment will be necessarily rendered against the party demurring, because he has admitted the truth of the pleading; that is, has confessed the facts held to constitute a cause of action or defense. Such is the theory, and yet it is improperly called an affirmative admission. Nothing is in fact admitted. The demurrant simply denies the proposition of law involved in the pleading demurred to, and the parties go to trial upon an issue of law, and if this issue is found against him, judgment goes against him. The facts are admitted only because they are not denied." Bliss, Code Pl. § 418.

A demurrer, then, is not an absolute admission. Its only office is to raise issues of law upon the facts stated in the pleadings demurred to. Nor, as CROCKETT, J., said, is "the effect of a demurrer to set out the facts. On the contrary, all the facts involved in a demurrer are those alleged in the pleading demurred to, and the demurrer merely raises a question of law as to the sufficiency of the facts to constitute a cause of action or defense." *Bren-*

nan v. Ford, 46 Cal. 12. When allegations in a pleading are admitted for the purpose of a demurrer, they are admitted for that purpose only, and should not be commented upon by the court as if they were *de facto* true. *Day v. Brownrigg,* 10 Ch. Div. 294. It is a pleading by which one of the parties in effect says that the facts stated by the adverse party in his pleading, even assuming them to be true, do not sustain the contention based on them, or, in a word, do not show a good cause of action or defense. This is not admitting the facts charged as *de facto* true. It is simply admitting the facts for the sole purpose of presenting their sufficiency to the court for determination; or equivalent to saying: "If the facts be so, the defendant is not bound to answer." Now, this is not the kind of pleading, or the admission required by the pleading, which the statute contemplates. It requires the admission of the charge as a fact, not assumed to be true for the purpose of ascertaining its legal sufficiency, but confessed to be true as an actual fact, and a showing of other facts in avoidance or bar of the suit. This cannot be done by demurrer, for its office is not to set out facts. The statute evidently contemplates that the charge admitted, and the other facts shown in bar of the suit, by the defendant, shall be embraced in one pleading to accomplish this result. It says: "The defendant may admit the charge, and show in bar of the suit that the act complained of was committed by the procurement of the plaintiff, or that it has been expressly forgiven, or that the suit has not been commenced within one year after the right of suit accrued." A demurrer cannot perform the office contemplated by this provision. If a demurrer were such a solemn admission upon record as claimed by counsel, then it might be used against the defendant upon a subsequent trial of an issue of fact, and it would become, like other admissions, a part of the law of evidence; yet, as evidence, we all know that it admits nothing whatever.

There was no error. The decree of the court below is affirmed, with costs and disbursements.[1]

[1] The rule is stated in Cutler v. Wright, 22 N. Y. 472, that an overruled demurrer not withdrawn is an absolute admission of the facts alleged in the pleading demurred to. To the same effect see Allen v. Commonwealth (1910), 140 Ky. 302. But the contrary was held in Jacobs v. Vaill (1903), 67 Kan. 107.

HEATON v. PACKER.

Appellate Division of the Supreme Court of New York. 1909.

131 New York Appellate Division, 812.

HOUGHTON, J.: The complaint alleges that the plaintiffs own and occupy lands in the borough of the Bronx, in the city of New York, adjoining to and abutting upon property owned by the defendants; that the lands occupied by the plaintiffs are in a high-class residential portion of the city of New York, and are suitable and valuable for residence purposes only; that the defendants have purchased the lands described in the complaint for the purpose of establishing, and are now erecting and altering the buildings thereon for the purpose of using them for a hospital for the insane, and the housing, keeping, and caring for a large number of insane persons. The complaint further sets forth a large number of dangerous and disagreeable things which will occur from the establishing and maintaining of such a hospital for the insane, amongst others, that it will greatly depreciate the value of plaintiffs' property for residential purposes, and destroy the neighborhood as a residential section, and make it dangerous for women and children to go upon the streets adjacent to the hospital, and make the residents nervous and ill from seeing unseemly sights and hearing unseemly noises. The relief asked is, not that the defendants shall be restrained from the further erection and alteration of buildings, but that they shall be restrained from using them for the purposes of maintaining a hospital for the insane.

The defendants demurred to the complaint on the ground that it failed to state a cause of action, and, on that demurrer being overruled, appealed to this court.

* * * * * * * * * * *

The plaintiffs urge that the various things which they have alleged will happen stand admitted by the demurrer. The difficulty with applying this rule is that from the nature of the allegations they are not allegations of existing facts, but only allegations of what will transpire in the future. Where allegations of this character are made, it

cannot be that the demurrer admits that the things will actually occur as alleged; but it is left open for the court to say whether or not, from the nature of things, they probably and necessarily will happen. In our view the demurrer does not admit that all the disagreeable and dangerous things set forth in plaintiffs' complaint will actually arise. Nor does it appear to us that they will necessarily arise from the use to which the defendants propose to put their property. It follows, therefore, that the plaintiffs have failed to state a cause of action entitling them to an injunction.

* * * * * * * * * * *

The interlocutory judgment overruling the demurrer should be reversed, and the demurrer sustained, with leave to the plaintiffs to amend upon payment of costs.

PATTERSON, P. J., MCLAUGHLIN, LAUGHLIN, and CLARKE, JJ., concurred.

MALLINCKRODT CHEMICAL WORKS v. NEMNICH.

Supreme Court of Missouri. 1902.

169 Missouri, 388.

SHERWOOD, P. J.: This proceeding (one in equity) sought to enjoin defendant from carrying on the manufacture of chemicals, drugs, etc., in the states of Missouri and Illinois.

* * * * * * * * * * *

The sixth paragraph of the contract is the one on which plaintiff relies for relief, as is apparent from its petition; that paragraph being as follows:

"Sixth. That he, the said Rudolph Nemnich, agrees and covenants, and herewith binds himself, that for and within the period of six years after he has left the service of said corporation, and within the territory of the United States, he, the said Rudolph Nemnich, will not in any manner or form, directly or indirectly, either by himself, or with others, engage in the selling, dealing, or manufacture of any of the articles now or then being manufac-

tured, sold, or dealt in by said Mallinckrodt Chemical Works."

Regarding such paragraph the allegations of the petition are: "Defendant went into the service of plaintiff in its manufactory according to said contract, and remained in the employ of plaintiff under said contract until January, 1898, when his term of said employment by said plaintiff expired; and he took and enjoyed all the fruits of its provisions according to its terms until said contract had been fully complied with on the part of plaintiff. After the expiration of said term, defendant left the service of plaintiff and at a more recent date, heretofore, in the year 1898, in the city of St. Louis, defendant entered upon, and is now engaged in, the manufacture and sale of chemicals, drugs, and other articles of the same kind and character as those manufactured, sold and dealt in by the plaintiff at the present time, as well as dealt in at the time when said contract was entered into. That said acts on defendant's part are a breach of the obligation imposed by his agreement aforesaid, as part of the said contract."

"During defendant's stay in plaintiff's service he had full and free access to the working departments of plaintiff's manufactory, and acquired knowledge of many of the processes of manufacture in use by plaintiff and its employes for the manufacture of drugs and chemicals. Defendant during said service also obtained information of the names of many of plaintiff's regular customers, and of persons who purchased drugs and chemicals of plaintiff in various sections and states of the United States. Defendant, in the manufacture and sale of chemicals and drugs as aforesaid, is utilizing and applying for his own use the said knowledge and information so acquired and obtained by him while in plaintiff's employ."

Of these allegations of the petition, it is observable that the last clause of it, as above quoted, charges that "defendant, in the manufacture and sale of chemicals and drugs as aforesaid, is utilizing and applying for his own use the said knowledge and information so acquired and obtained by him while in plaintiff's employ."

In *what way* is defendant *utilizing and applying* for his own use the knowledge, etc.? *What are the facts?* Surely defendant was entitled to a statement of the constitutive facts which compose plaintiff's cause of action, if it had

any, for this is the rule of our code. *Pier v. Heinrichoffen,* 52 Mo. 333. And equally as surely, such facts plaintiff did not set forth. The allegation quoted is simply the averment of a *legal conclusion,* not the statement of *issuable facts,* and not, therefore, either *traversable or demurrable,* and is to be treated as no statement at all, and consequently obnoxious to attack by *general* demurrer. Bliss, Code Pl. (3d Ed.) § 413, and note; Id. §§ 210-213; *Craft v. Thompson,* 51 N. H., loc. cit. 540; *McKinzie v. Mathews,* 59 Mo., loc. cit. 102; *Cooper v. French,* 52 Iowa, 531, 3 N. W. 538.

"The allegation of a conclusion of law raises no issue, need not be denied, and its truth is not admitted by a demurrer to the complaint containing it." Kittinger v. Traction Co. (N. Y.) 54 N. E. 1081. See, also, 12 Enc. Pl. & Prac. 1022 et seq.; *Institute v. Bitter,* 87 N. Y. 250; *Hoester v. Sammelmann,* 101 Mo., loc. cit. 624, 14 S. W. 728.

Under these authorities, the clause being discussed, being a mere legal conclusion, and therefore wholly worthless, is entirely eliminated from further consideration, and it is as though it had not been pleaded.

Nor will it do to say that defendant should have moved to have made the pleading more definite and certain. He might, indeed, have done this, but was not compelled to do so. The primary duty of making the pleading definite and certain is on the party drawing the pleading, and he cannot by his remissness cast on his opponent the onus of doing what his own duty demands,—a duty which consists in expressing his meaning clearly and unmistakably. This view is the one taken in New York, whence our code is derived. *Snyder v. Free,* 114 Mo. 360, citing *Clark v. Dillon,* 97 N. Y. 370.

And in New York it has been ruled that section 519 of the code, in relation to a liberal construction of pleadings with the view to substantial justice between the parties, extends only to *"matters of form,"* and does not "apply to the fundamental requirements" of a good pleading. *Clark v. Dillon, supra,* and cases cited. To the like effect, see *Young v. Schofield,* 132 Mo. 650; *Boles v. Bennington,* 136 Mo. 522.

With the clause aforesaid eliminated, nothing remains for consideration of the last-quoted portion, except the residue or the first paragraph of such quotation, which

relates to defendant's engaging in the manufacture and sale of chemicals, drugs, etc., of the same kind and character, etc. But this also is but the *conclusion of the pleader,—a bare legal conclusion,* unsupported by the allegation of *a single fact.* It would be impossible for defendant to traverse such an allegation, except in terms equally vague and vexatiously general, to deny that he "is now engaged in the manufacture and sale of chemicals, drugs," etc., "of the same kind and character," etc. But this sort of answer would raise no issue for a jury to try, or to base a verdict upon. *Facts* should have been stated which would have enabled the courts to have seen, from reading the allegations of the petition, that defendant was brought within the terms of the contract, and consequently within the breaches thereof. In other words, *what* particular drugs, chemicals, etc., were being manufactured by defendant, should have been set forth in the petition, in order for defendant to have had notice and opportunity to traverse the allegations of the petition by alleging that the drugs, chemicals, etc., he was engaged in manufacturing were not those embraced within the terms of the contract or the allegations of the petition. In no other way could the facts be presented so as to raise an issue for a jury to try, or for a court of equity to grant relief upon. See above-cited authorities and *Cooper v. French,* 52 Iowa, 531; *Seele v. Engell,* 17 Barb. 530.[1]

* * * * * * * * * *

[1] *Facts Well Pleaded.* A very common statement of the rule is that a demurrer admits all facts well pleaded. Anable v. McDonald Land & Min. Co. (1910), 144 Mo. App. 303; Larabee v. Dolley (1909), (C. C. D. Kan.), 175 Fed. 365; Dillow & Co. v. City of Monticello (1910), 145 Iowa 424; Gibson v. Chicago Great Western Ry. Co. (1910), 225 Mo. 473; National Hollow Brake Beam Co. v. Bakewell (1909), 224 Mo. 203; Eckles v. Des Moines Casket Co. (1911), 152 Iowa 164; Reams v. Taylor (1906), 31 Utah 288.

It was held in Lackawanna Coal & Iron Co. v. Long (1910), 231 Mo. 605, that "a demurrer admits facts pleaded only when they are well pleaded and are not absurd or impossible."

Alternative pleading is a ground for general demurrer in some cases. See Anderson v. Minneapolis, St. Paul & S. Ste. M. Ry. Co. (1908), 103 Minn. 224, given in the text, *supra;* Second National Bank of Springfield v. Hart (1893), 8 Ind. App. 19. Though a motion is the ordinary remedy: Indianapolis & Northwestern Traction Co. v. Henderson (1906), 39 Ind. App. 324.

Allegations by way of recital make a pleading bad on general demurrer. See Thompson v. Read (1909), 63 Misc. (N. Y.) 235, and Malott v. Sample (1904), 164 Ind. 645, given in the text, *supra.* To the same effect are Ilfeld v. Ziegler (1907), 40 Colo. 401; Leadville Water Co. v. Leadville (1896), 22 Colo. 297; Jackson School Township v. Farlow (1881), 75 Ind. 118; Moulton v. Doran (1865), 10 Minn. 67. *Contra:* Fuller Desk Co. v. McDade (1896), 113 Cal. 360.

Hypothetical pleading is sometimes held bad on general demurrer. Ilfeld

v. Ziegler (1907), 40 Colo. 401. But usually the objection must be taken by motion. See Emison v. Owyhee Ditch Co. (1900), 37 Ore. 577, given in the text, *supra*.

Allegations upon information and belief which should have been made positively, will not render the pleading bad on general demurrer, but should be taken advantage of by motion. Mitchell v. Knott (1908), 43 Colo. 135.

Exhibits. Whether an exhibit attached to and made a part of a pleading may be looked to on demurrer to supply the want of material averments in the body of the pleading, is a question upon which there is a sharp conflict. In the following case it was held that the exhibit could *not* supply averments or show facts necessary to the cause of action, as against a demurrer for insufficiency: Malheur County v. Carter (1908), 52 Ore. 616.

On the other hand, it was held in the following case that an exhibit might be looked to on demurrer in aid of an otherwise deficient pleading: Carson v. City of Hastings (1908), 81 Neb. 681.

A bill of particulars is no part of the pleading and cannot be looked to on demurrer: Creighton v. Creighton (1903), 68 S. C. 326.

SPRAGUE v. NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

Supreme Court of Errors of Connecticut. 1896.

68 Connecticut, 345.

FENN, J.: This is an action by an administratrix to recover damages for an injury which caused the death of the intestate.

* * * * * * * * * * *

The court, upon a hearing after demurrer overruled, assessed full damages, and rendered judgment accordingly.

* * * * * * * * * * *

The nine reasons of appeal assigned by the defendant present, in effect, two questions, and two only, for our consideration: * * *

Second. Did the court err, in a hearing in damages upon demurrer overruled, in using the admission of the demurrer as substantive evidence against the defendant, —as evidence which must be overcome in order to prevent the plaintiff from recovering full damages.

* * * * * * * * * * *

The admission arising from a demurrer or a default is in no sense to be regarded as an acknowledgment, or used as evidence, or considered as equivalent to evidence, of liability on the part of a defendant for substantial

damages; nor, indeed, that there were any such damages suffered, or, if so, that they were in any way chargeable to the defendant. What the cases in this jurisdiction have held is, substantially, that when a plaintiff in an action of tort, standing upon default or upon demurrer overruled, has proved actual and substantial damages, resulting to him from the injury complained of, such proof is in the first instance, and prima facie, sufficient to indicate that such injury and damage, to the extent proved, is chargeable to the defendant's fault, and that, therefore, the case made out is one which calls upon the defendant to meet it by counter evidence, or submit to judgment for the sum proved. We think the trial court acted with this view of the law, and properly. There is no error.

(c) Searching the Record.

BAXTER v. McDONNELL.

Court of Appeals of New York. 1897.

154 New York, 432.

VANN, J.: * * *

* * * * * * * * * * *

The rule is that, on demurrer to an answer for insufficiency, the defendant may attack the complaint on the ground that it does not state facts sufficient to constitute a cause of action. *People v. Booth,* 32 N. Y. 397. *Village of Little Falls v. Cobb,* 80 Hun, 20, 27; 6 Enc. Pl. & Prac. 326.

A demurrer searches the record for the first fault in pleading, and reaches back to condemn the first pleading that is defective in substance, because he who does not so plead as to invite an issue cannot compel his adversary to so plead as to accept it. *Clark v. Poor,* 73 Hun, 143; *Williams v. Williams,* 25 Abb. N. C. 217, 753; *Carning v. Roosevelt,* 25 Abb. N. C. 220, and cases cited in note. As "a bad answer is good enough for a bad complaint," it is necessary to examine the record to see whether the allegations of the complaint are sufficient to constitute a cause of action. The complaint contains two counts, and

the defense in question is general, so that it applies to either. Unless both counts are defective, the demurrer must be examined upon the merits; but, if neither sets forth a cause of action, the sufficiency of the pleading demurred to cannot be considered. *Wheeler v. Insurance Co.*, 82 N. Y. 543, 555; *Boyle v. City of Brooklyn*, 71 N. Y. 1.

* * * * * * * * * * *

Upon the argument before us, the sufficiency of the complaint was not discussed, doubtless upon the assumption that it was not involved in the question certified. In order to avoid the danger of doing injustice, we think that a reargument should be had, so that counsel may present their views upon that subject; and it is ordered accordingly.

GRAY, O'BRIEN, BARTLETT, and MARTIN, JJ., concur. ANDREWS, C. J., and HAIGHT, J., not voting.

Reargument ordered.

CALLAHAN v. LOUISVILLE DRY GOODS COMPANY.

Court of Appeals of Kentucky. 1910.

140 Kentucky, 712.

Opinion of the Court by Judge LASSING—Affirming:

Plaintiff instituted its suit in the Jefferson Circuit Court, wherein it sought to recover of the defendant, Ed. Callahan, $752.68, with interest from March 1, 1907, on a promissory note which had been executed by defendant to the Grauman-Henchey-Cross Company, and which had been transferred by the latter company to plaintiff. Defendant pleaded, by way of abatement, the pendency of another suit in the Breathitt Circuit Court, wherein a recovery was sought against him on the same note. In its reply the plaintiff denied the pendency of said suit in the Breathitt Circuit Court, and pleaded affirmatively that said suit had been dismissed without prejudice, and filed certified copies of the record of said court showing this fact. To this reply a demurrer was interposed, and, being over-

ruled, defendant declined to plead further, and judgment was entered in accordance with the prayer of the petition. From that judgment this appeal is prosecuted, and a reversal sought on the ground that the demurrer to the reply brought before the court the entire record for inspection, and, upon consideration, the judge should have held the petition faulty.

This contention would be sound if the pleading to which the demurrer was filed was responsive to the petition; but the reply was responsive to the matter set up in the answer, and this sought to avoid plaintiff's right to sue in the Jefferson Circuit Court, but in no wise questioned or put in issue any allegation of the petition. If defendant regarded the petition as defective, and desired to question its sufficiency, the court's attention should have been called to such defect by demurrer, or plea properly made in the answer. But the sufficiency of the petition cannot be raised by an attack upon another pleading not responsive to it.

Newman, in his Pleading and Practice (section 542a), thus states the rule.

This rule, that the court will consider the whole record on demurrer, does not authorize the consideration of other parts of the pleading not embraced in or relating to the part to which the demurrer is filed. Thus a demurrer to the petition cannot bring before the court an allegation made in an answer filed in the case; nor does a demurrer to one paragraph of the petition, or to the answer to such paragraph, involve in its decision an inquiry into the validity of any other paragraph of the petition. But, as before said, if the paragraph of the answer demurred to is a response to a separate paragraph or cause of action set out in the petition, the demurrer reaches back to that paragraph or cause of action, but none other."

In *Dean v. Boyd,* 39 Ky. 169, this court held that a demurrer to a plea in abatement did not bring the petition before the court, or even authorize the court to consider it. This case is decisive of the question under consideration.[1]

* * * * * * * * * * *

[1] *Accord:* Darnell v. State (1909), 174 Ind. 143, 149.

BALDWIN v. CITY OF ABERDEEN.

Supreme Court of South Dakota. 1909.

23 South Dakota, 636.

WHITING, J.: This is an action instituted by the plaintiff and respondent to recover from the defendant and appellant damages which the plaintiff claims to have suffered owing to the negligence of the defendant in maintenance and care of its streets. The complaint sets forth the defective condition of the street; the fact that plaintiff fell owing to the defective condition of such street, and that she sustained injury as the result of such fall. The defendant, answering, for the first defense interposed a general denial, and for the second defense alleged that plaintiff had not given to the city through its auditor any written notice of the time, place and cause of the alleged injuries, and that such auditor or clerk had received no written or verbal notice of any kind of the time, place, or cause of such injury. The plaintiff interposed a demurrer to the second defense contained in such answer alleging as grounds of said demurrer that said second defense does not set forth facts sufficient to constitute a defense in this action. At the time of the hearing on demurrer, the defendant objected to further proceedings in said action for the reason that the facts stated in the compliant did not constitute a cause of action against the defendant, and specified some six alleged defects in said complaint. Upon the hearing of such demurrer and objections, the objections were overruled and the demurrer sustained; and it is from such order overruling such objections and sustaining the demurrer that this appeal is taken. Appellant alleges three errors, as follows: First, that the court erred in sustaining the demurrer of plaintiff to the second defense contained in its answer; second, the court erred in overruling the objections made by the defendant at the time of argument of such demurrer for the reasons stated in said objections; third, the court erred in holding that the complaint of the defendant stated facts sufficient to constitute a cause of action against the defendant. That there may be no misunderstanding of the record we would state

that the court in making its order simply sustained the demurrer to the second defense and overruled the objections interposed, but did not in any manner hold or state that the complaint stated facts sufficient to constitute a cause of action against the defendant.

The complaint alleges that the injury complained of was received on the 1st day of June, 1907, and the summons herein was issued July 1, 1907. From the above it will be noticed that the defendant did not directly demur to the complaint, but it is its contention on appeal that under the well-established rule of practice to the effect that a demurrer searches the whole record its objections became virtually a motion to the court asking the court to set aside the complaint on the demurrer to the said second defense in answer, or, in other words, that the court was bound to consider the complaint as demurred to. While we doubt the correctness of appellant's contention, and do not think the interposing of the objections was the equivalent to moving the trial court to treat the complaint as demurred to, yet, for the purposes of this appeal, we will consider the case the same as if the defendant had by direct motion or petition asked the court to apply the rule above stated, to the effect that a demurrer does search the whole record. This then leaves two questions for consideration:

First. Under the conditions of the pleadings in this case, could the rule that a demurrer searches the whole record apply to the complaint herein? If the above should be answered in the negative, then was the demurrer to the second defense properly sustained? A person answering a complaint, if the answer is a general denial, admits for the purposes of the trial that the facts pleaded in the complaint state a good cause of action. 9 Ency. Pleading & Practice, 882. On the other hand, if the defendant demurs to such complaint for the purposes of the demurrer, he admits the facts to be as alleged in complaint, but contends that they are not sufficient to show cause of action. It will thus be seen that a general denial and a demurrer are absolutely inconsistent the one with the other, and for that reason, both under the common law and the codes in practically all of the states, it is held that a person cannot interpose to the same cause of action both a general denial and a demurrer, unless perhaps in those

cases where the allegations of the complaint purporting to state the cause of action are divisible in their nature. 31 Cyc. 310; 6 Ency. of Pleading and Practice, 382; 9 Ency. of Pleading and Practice, 882; Baylies' Code Pleading and Forms, 203. Applying the above rule in this case, it will be seen that the defendant could not have pleaded its first defense and joined with it a general demurrer. Could it indirectly do what it could not do directly? Undoubtedly appellant in the trial court could have asked leave to withdraw its answer and have interposed a demurrer, but such action was not taken, and this general denial stood as a part of the answer at the time of the hearing on demurrer to the other part of the answer. The courts uniformly hold that one cannot indirectly demur where it could not directly, and that for that reason the rule that a demurrer searches the whole record has no application as against a pleading to which a general denial has been interposed. 31 Cyc. p. 342; 6 Ency. of Pleadings and Practice, 332; Baylies' Code Pleadings and Forms, 287; *Wheeler v. Curtis et al.*, 11 Wend. (N. Y.) 660. The court in *Wheeler v. Curtis* says: "Whether the first count in the declaration is defective or not is a question that cannot be raised upon this demurrer. The defendants have pleaded the general issue to the whole declaration, and to permit them on a demurrer to the replication to go back and object to the declaration would be allowing the defendants to do indirectly what they could not do directly, to wit, plead and demur to the same count. 5 Bac. Pleas. & Ple. 457, note. They cannot override the general issue and have the benefit of a demurrer in this way under the rule that a party may go back, and take advantage of the first fault in pleading for the operation and effect would be the same as if a general demurrer had been put into the defective pleading." It is therefore clear that the defendant was in no position to question the sufficiency of the complaint.[1]

* * * * * * * * * *

[1] See note to this case in 26 L. R. A. (N. S.), 116, showing that the rule stated above obtains in Illinois, but does not obtain in Indiana and was not recognized in New York before the code.

FULTON COUNTY GAS AND ELECTRIC COMPANY v. HUDSON RIVER TELEPHONE COMPANY.

Court of Appeals of New York. 1911.

200 New York, 287.

COLLIN, J.: * * * The amended answer of defendant, served under said leave, set forth, in addition to denials and defenses, two counterclaims to each of which the plaintiff demurred upon the two grounds that : (1) The counterclaim was not of the character specified in section 501 of the code of civil procedure; (2) the counterclaim did not state facts sufficient to constitute a cause of action. The special term rendered a judgment overruling the demurrers to the counterclaims, which the appellate division reversed, and the defendant has appealed to this court, under leave of the appellate division, which has certified four questions for determination:

* * * * * * * * * * *

The questions designated "First" and "Fourth" assume that we are permitted, under the demurrer of plaintiff to the counterclaim, to determine whether or not the complaint is defective in substance. The learned counsel for the defendant takes and supports with authorities the same position. Those authorities rest their conclusion upon two grounds: The one, a demurrer searches all the pleadings prior to itself for the first fault in pleading, and, upon the trial of the issues created by the demurrer, judgment is to be given against the party who committed that first fault; the other, a counterclaim is a pleading in the action and to the complaint and is subject to the rule that a demurrer reaches back to the first defective pleading. The second ground cannot be sustained. A counterclaim is a statutory remedy. The code of procedure created it in an amendment of 1852 of subdivision 2 of section 149 thereof. Such subdivision continued unchanged until it was repealed in 1877, in consequence of the enactment of section 500 of the code of civil procedure. The code of procedure in its section 150 contained provisions now represented by section 501 of the code of civil procedure. Under the provisions of the code of civil procedure, which prescribe the fab-

ric and regulate the exercise of a counterclaim, the facts alleged as a counterclaim must be sufficient to constitute a perfect cause of action in favor of the defendant and against the plaintiff and to sustain the judgment against the plaintiff which the defendant thereby seeks and must demand. Sections 501, 509.

* * * Those provisions avouch that a counterclaim passes far beyond the range of merely answering or defending against or being responsive to the complaint. It may and frequently does admit the entire complaint and stand as the sole litigation between the parties. The answer alleging it is, in effect, both answer and complaint, and in so far as it is a complaint, in so far as it thrusts into the pending action a cause of action in defendant's favor against the plaintiff, it is without the line of pleading started by the complaint, and which, upon demurrer, may be followed back in order that judgment shall be rendered against the party who committed the first fault. It is just that he who does not so plead as to invite an issue cannot compel his adversary to so plead as to accept it, but it is not just that he should be compelled to accept and defend as a cause of action against him that which is not a cause of action and fails, through insufficiency of substance, to charge him with liability. The wisdom of this conclusion may be variously illustrated. It would not be orderly or proper that a defendant might, because of the insufficiency of the complaint, proceed against the demurring plaintiff upon plaintiff's indorsement of a promissory note held by defendant, payment of which had not been demanded, and which had not been protested; or upon a counterclaim wholly inadmissible under section 501 of the code of civil procedure. For the reasons stated, we decline to pass upon the sufficiency of the complaint and to answer the questions designated "First" and "Fourth."

* * * * * * * * * *

(d) Issues Raised by Demurrer.

TONER v. WAGNER.

Supreme Court of Indiana. 1901.

158 Indiana, 447.

DOWLING, J.: The appellee, as administrator of the estate of Jane Brunk, deceased, sued the appellants Edward Toner and Albert D. Toner, Sr., upon a promissory note for $1,998.88, dated October 10, 1887, and payable one year thereafter to the said Jane Brunk. The action was brought in the Fulton Circuit Court, and the venue was subsequently changed to Marshall county. A demurrer to the complaint was overruled, and an answer was filed consisting of a plea of payment and a general denial. A reply in denial of the answer of payment was filed. The cause was tried by the court, and a finding was made in favor of the appellee, and, over a motion for a new trial, judgment was rendered on the finding. The rulings of the court on the demurrer and on the motion for a new trial are assigned for error.

The objections taken by appellants to the complaint were that it did not aver that Jane Brunk was dead, nor that the appellee was the administrator of her estate. Counsel for appellants say that the words, "administrator of the estate of Jane Brunk, deceased," in the title of the cause and in the body of the complaint, are merely descriptio personæ, and are not equivalent to an allegation that letters of administration upon the estate of the said Jane Brunk were issued to the said Wagner.

The ground of appellants' demurrer was that the complaint did not state facts sufficient to constitute a cause of action. Appellee insists that, where this cause is assigned, the objection that the complaint does not show that the plaintiff sues in a representative capacity is not available, and that, to raise the question discussed by counsel for appellants, the demurrer should have challenged the legal capacity of the plaintiff to sue. Sections 342, 2447, Burns' Rev. St. 1901; *Nolte v. Libbert,* 34 Ind. 163; *Hansford v. Van Auken,* 79 Ind. 157, 160.

But the point made against the complaint is, not that the

plaintiff had not the legal capacity to sue, but that it did not show that the plaintiff was the administrator of the estate. In other words, appellants admit that, if it was shown that the plaintiff below was the administrator of the estate of Jane Brunk, then he had the legal capacity to sue, but that, as the plaintiff was not shown to be an administrator at all, and that he sues in his personal capacity to collect a debt due an estate, the complaint does not show a right of action in him, but in an administrator of such estate. This question is properly presented by a demurrer for want of facts. *Coddington v Canaday,* 157 Ind. 243. The title of the cause and the commencement of the complaint are as follows. "Frank L. Wagner, administrator of the estate of Jane Brunk, deceased, v. Edward Toner and Albert D. Toner, Sr. The plaintiff in the above-entitled cause, as administrator of the estate of Jane Brunk, deceased, complains," etc.

We are asked by counsel for appellants to disregard the words "as administrator of the estate of Jane Brunk, deceased," in the body of the complaint, and to construe that pleading as if the action were brought in the name of Frank L. Wagner alone, with no designation of the character in which he sues, and with no indication of his connection with the note sued upon. This we do not feel authorized to do. The statutory rule requires that a liberal construction shall be given to the pleadings in civil causes, with a view to substantial justice between the parties. Section 379, Burns' Rev. St. 1901. A somewhat similar objection was taken to the complaint in *Durham v. Hudson,* 4 Ind. 501, and the court said: "The counts all show plainly enough that the plaintiff was suing as administrator, and the proper judgment was rendered. We shall not disturb the judgment on this ground."

* * * * * * * * * * *

A formal allegation of the death of Mrs. Brunk, and of the issuing of letters of administration upon her estate to the person named as administrator, would have been more in accordance with the rules of good pleading and with approved precedents than the form of averment adopted; but under the liberal provision of the civil code, as interpreted and applied by this court, the complaint must be held sufficient. While there is some diversity of opinion as to the necessity of such allegations of the death of the intestate

and the appointment of the administrator or executor, the tendency of the courts is toward a relaxation of the strictness of the common-law rules of freedom, and it is now generally held that no formal words are essential to show the representative character in which the plaintiff sues. *Lucas v. Pittman,* 94 Ala. 616; *Cordier v. Thompson,* 8 Daly, 172; *Beers v. Shannon,* 73 N. Y. 297; *Chamberlain v. Tiner,* 31 Minn. 371. It may also be observed that the statute expressly dispenses with profert of the letters of administration, and requires that any denial of the right of the alleged administrator to sue shall be made under oath. Section 2747, Burns' Rev. St. 1901.

In the present case no one could be misled by the title of the cause, or by the averments in the body of the complaint, as to the character in which the plaintiff sued his title to the note, or that the payee of the note was dead.

* * * * * * * * * * *

We find no error in the record.

Judgment affirmed.

MUELLER v. LIGHT.

Supreme Court of Arkansas. 1909.

92 Arkansas, 522.

HART, J.: The statement of the case made by counsel for appellant is adopted. This is an appeal from the action of the chancery court of Greene county in sustaining the demurrer of defendants to plaintiff's complaint. The allegations of the complaint are substantially as follows:

* * * * * * * * * * *

To this complaint defendants filed their demurrer, setting up their grounds therefor in five paragraphs, as follows: "(1) That said complaint does not state facts sufficient to constitute a cause of action. (2) That said complaint shows on its face that it is barred by the statute of limitations of five years. * * *

The court sustained the demurrer and dismissed the complaint, plaintiff saving exceptions. The decision of the

chancellor was correct. One of the grounds of demurrer is that the complaint shows on its face that it is barred by the statute of limitations. Can the defendant on demurrer interpose the statute of limitations in equity? In the case of *McGehee v. Blackwell et al.*, 28 Ark. 27, the court said: "Section 111 of the code provides for what matters demurrers may be interposed. If the interposition by demurrer of the statute of limitations is proper under the code, it must be under the fifth clause of section 111, which reads as follows: 'That the complaint does not state facts sufficient to constitute a cause of action.' We see nothing in this clause otherwise than permission, at least, of the use of the demurrer in interposing such bar, where the cause of action appears upon the face of the complaint to be barred; for in such case, there is in law no cause of action alleged. And this, we believe, is in strict analogy with the old chancery practice."

In equity, when the complaint shows on its face that the cause of action is barred by the statute of limitations and does not allege facts sufficient to remove the bar, the plea of the statute of limitations may be interposed by demurrer. This rule is announced and approved by all text-writers on equity pleading and practice. See, also, *McGehee v. Blackwell, supra.* The complaint shows on its face that the cause of action was barred, and it does not disclose facts sufficient to remove the bar. * * *

* * * * * * * * * * *

CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY v. SIERRA VALLEYS RAILWAY COMPANY.

Supreme Court of California. 1910.

158 California, 692.

SLOSS, J.: * * *

* * * * * * * * * * *

Finally, the appellant raises the point that the defense of limitation was waived by reason of the fact that the various cross-defendants did not raise this defense by demurrer,

but set up the bar of the statute by answer. The contention is that, under sections 433 and 434 of the code of civil procedure, an objection specified in section 430 as ground of demurrer (except want of jurisdiction or failure to state facts), must, if it appears on the face of the complaint, be taken by demurrer, or be deemed to be waived. *Tingley v. Times-Mirror Co.*, 151 Cal. 1, 13, 89 Pac. 1097. If this be the rule, it is clear that the defense of limitation does not come within it. This defense is not specified in section 430 as a ground of demurrer. While defendants have been permitted to demur on the ground that the action was barred, the only subdivision of section 430 under which this ground of demurrer could be brought was that "the complaint does not state facts sufficient to constitute a cause of action." But, inasmuch as the statute of limitations is a special defense, personal in its nature, which may be waived or asserted, the party relying upon it must affirmatively set it up in his pleading. A demurrer merely stating that there is a want of facts will not suffice. *Brown v. Martin*, 25 Cal. 82; *Bliss v. Sneath*, 119 Cal. 526, 51 Pac. 848. Accordingly, there has grown up a practice, difficult, perhaps, to defend on logical grounds, of permitting a defendant to demur to a complaint on the ground that "it fails to state facts sufficient to constitute a cause of action, in this, that the alleged cause of action appears to be barred by the provisions of * * *." This is an exception to the general rule that no particular specification is required in a demurrer for want of facts. *Kent v. Snyder*, 30 Cal. 666, 672. But, notwithstanding the necessity for such particularity, the only ground of demurrer applicable is the failure to state facts sufficient, and this ground is, by the express provision of section 434, not waived by failure to demur. The true rule, under our practice, is, we think, that the defendant may, if the defect appears on the face of the complaint, set up the bar of the statute either by demurrer or by answer. If the complaint does not show that the statute has run, the defendant must plead his right by answer. In the present case, it appears that the cross-defendants did not demur at all, but came in at once and filed answers setting up the bar of the statute. It would be a harsh ruling to hold that, merely because they had claimed their privilege by answer rather than by demurrer, they had waived a defense which they had asserted at the

earliest opportunity. We shall not so hold, inasmuch as the code sections relied on by appellant do not require it.

The record presents no other points requiring notice.

The judgment is affirmed.[1]

ANGELLOTTI, J., and SHAW, J., concurred.

[1] The doctrine upon which this case rests is more fully discussed in Bliss v. Sneath (1898), 119 Cal. 526, where the court quotes from Kent v. Snyder, 30 Cal. 672, as follows: "Whenever a defense is of the nature of a special privilege, of which the party can only avail himself by pleading it, then the pleading, whether it be by demurrer or answer, must specify the grounds of his defense. A complaint which states a cause of action which might be defeated by interposing the statute of limitations may be sufficient to support a judgment, provided the defendant does not choose to avail himself of the defense afforded him; and hence if he elects to avail himself of any defense personal to himself, as a special privilege or immunity, he must manifest that election by pleading it."

FITGER BREWING COMPANY v. AMERICAN BONDING COMPANY OF BALTIMORE.

Supreme Court of Minnesota. 1911.

115 Minnesota, 78.

SIMPSON, J.: This action was brought to recover for payment made by plaintiff upon lien claims after the same had been adjudged valid charges against his property. The claimed liability of defendant Hilliard, the general contractor, arose out of a breach of his contract in failing to refund to plaintiff the amount paid on lien claims. The claimed liability of the defendant the American Bonding Company of Baltimore arose upon a bond given by it, as surety, and Hilliard, as principal, conditioned upon the performance by Hilliard of his contract, through the required payment by plaintiff of the lien claims. The defendant company interposed a general demurrer to the complaint. The district court, by its order, sustained the demurrer on the ground that it conclusively appeared from the complaint that the action on the defendant's bond was not brought within the period limited by the terms of the bond for bringing actions thereon. The case is brought to this court by the appeal of the plaintiff from such order.

The plaintiff questions the correctness of the order sus-

taining the demurrer, and claims (1) that, the limitation being by contract, the bar is not invoked by demurrer, but must be set up by answer as a defense; and (2) that it does not appear from the complaint that the action is not brought within the period limited by the bond.

1. The established rule in this state is that the bar of a limitation, when fixed by statute, may be invoked by a general demurrer. No reason is suggested or is apparent why a different rule should be adopted as to a valid limitation established by contract. The same principle applies in each case. A demurrer should be given a uniform effect as a pleading. If it conclusively appears by the complaint that the action on the bond was not brought within the time limited by the terms of the bond for bringing actions thereon, the general demurrer was properly sustained.

* * * * * * * * * * *

KLEINCLAUS v. DUTARD.

Supreme Court of California. 1905.

147 California, 245.

ANGELLOTTI, J.: * * *

* * * * * * * * * * *

It is settled in this state that the defense of laches may be raised by demurrer; the defense being, in substance, as said in one of the cases, that the bill does not show equity, or, in the language of our statute, that the complaint does not state facts sufficient to constitute a cause of action. It therefore devolves on one seeking the aid of a court of equity in a case of this character, where the complaint shows great lapse of time without the assertion of any claim, and long-continued acquiescence in acts hostile to the claim, to allege in his complaint the circumstances showing good faith and reasonable diligence on his part. The complaint will be construed most strongly against the pleader, and, if circumstances that might excuse the delay are not alleged, it will be presumed that they do not exist. See *Bell v. Hudson*, 73 Cal. 289, 14 Pac. 791, 2 Am. St. Rep. 791; *Badger v. Badger*, 69 U. S. 87, 95, 17 Pac. 836.

* * * * * * * * * * *

SEAMANS v. BARENTSEN.

Court of Appeals of New York. 1905.

180 New York, 333.

CULLEN, C. J.: Plaintiff declared on an oral contract made in the latter part of March, 1900, whereby the defendant, for a term of one year, commencing on the 1st day of April, 1900, agreed to purchase the milk produced on the plaintiff's farm at a specified price, and claimed to recover damages for a breach of said agreement. The defendant answered, making a general denial, and pleading specially the statute of frauds. When the case was brought on for trial the defendant moved for judgment on the pleadings on the ground that the agreement declared upon was void under the statute of frauds. The motion was denied, and an exception duly taken. When evidence was offered to prove the contract, the defendant again objected that a contract is not to be performed within a year must be established by written proof. Over defendant's objection and exception, the evidence was admitted. The case was submitted to the jury on the disputed questions of fact, and a verdict rendered for the plaintiff. The judgment entered on that verdict was affirmed by the appellate division, and an appeal taken from such affirmance to this court.

The judgment below cannot be sustained. The contract on which the plaintiff has recovered was unquestionably void under the statute of frauds. Its invalidity not only appeared on the face of the complaint, but was expressly pleaded in the defendant's answer. The motion for judgment on the pleadings and the objection to the admission of the plaintiff's testimony sufficiently raised the question of invalidity of the contract. The learned appellate division seems to have affirmed the judgment of the trial term on the ground that, as the invalidity of the contract appeared on the face of the complaint, the defendant's objection to it could be taken by demurrer only, and was waived by the answer. This position is untenable.

Section 488 of the code of civil procedure specifies eight different causes of demurrer. It is entirely clear that the objection to the complaint in this action falls within the

eighth clause, to wit, "that the complaint does not state facts sufficient to constitute a cause of action." This the learned counsel for the respondent conceded on the argument. By section 498 of the code, when any grounds of demurrer do not appear on the face of the complaint the objection may be taken by answer. By section 499, an objection taken neither by demurrer nor answer is deemed to have been waived, except the objection that the complaint does not state facts sufficient to constitute a cause of action. The objection taken by the appellant at the opening of the trial was therefore taken in due time, and his motion for judgment on the pleadings should have been granted, for, by pleading the statute of frauds in his answer, his condition could not be worse than if he had not set it up at all.

The learned court below justified its disposition of the case by our decision in *Crane v. Powell,* 139 N. Y. 379, 34 N. E. 911. There it was held that, a complaint not showing whether the contract declared on was oral or written, the statute of frauds, to be available to defendant, must be pleaded. That decision does not touch the point presented by this appeal. There is, however, to be found in the opinion this sentence: "When the defect in the plaintiff's cause of action appears on the face of the complaint, the defense must be interposed by demurrer." "Must" in the opinion should be "may." Whether the text as it appears in the reports is a typographical error, a mistake of the copyist, or a slip of the learned judge in writing the opinion, is immaterial. If the last be the fact, it was merely *obiter,* for the point was not in any way involved in the case, and we could not decide away the express provision of the code.

The judgment appealed from should be reversed, and a new trial granted, with costs to abide the event.

GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

Judgment reversed, etc.

SINKER v. FLOYD.

Supreme Court of Indiana. 1885.

104 Indiana, 291.

ELLIOTT, J.: The appellant, Alfred T. Sinker, avers in his complaint that he sues for the use of Sarah A. Coates, and alleges that Mrs. Coates has sustained damages from a breach of covenants contained in a deed executed to her by the appellees. It is also alleged that Mrs. Coates received from the appellant a deed with full covenants for the same land as that described in the deed executed by the appellees.

The position of the appellee's counsel is that the complaint shows on its face that Sarah A. Coates is the real party in interest, and that, as the cause of action is in her, the appellant cannot recover. The appellant's counsel contend that the action may be prosecuted by the immediate grantor for the benefit of his grantee.

We are satisfied that, under our code, an action for a breach of covenant must be prosecuted in the name of the real party in interest, and that the real party in interest is the person entitled to the money recovered as damages. It is plain that Mrs. Coats and not Mr. Sinker, is the person entitled to the damages resulting from a breach of the covenants in the deed executed by the appellees. The latter has suffered no loss, and is entitled to no damages, for he has sustained no injury.

Where the face of the complaint shows a cause of action in a third person, and not in the plaintiff, it is bad because it does not state facts sufficient to constitute a cause of action. *Pence v. Aughe* (April 3), not yet reported. It seems quite clear to us that a plaintiff who shows by the allegations of his pleading that the right of recovery is in another, cannot maintain an action. This is the case here, for it affirmatively appears that Mrs. Coats, and not Mr. Sinker, is the only party entitled to recover, as she is the only person who has sustained a loss or suffered an injury.

We need not discuss the question whether Mrs. Coates, as a remote grantee, can maintain an action for the breach of the covenant of seizin; but it is not improper to refer

to our decisions upon that question. *Dehority v. Wright,* 101 Ind. 379; *Wright v. Nipple,* 92 Ind. 310; *Wilson v. Pelle,* 78 Ind. 384; *Coleman v. Lyman,* 42 Ind. 289.

Judgment affirmed.

(e) Effect of Failure to Demur.

EAST ST. LOUIS ICE AND COLD STORAGE COMPANY v. KUHLMANN.

Supreme Court of Missouri. 1911.

238 Missouri, 685.

LAMM, J.: * * *

* * * * * * * * * * *

(b) An objection at the trial to the introduction of testimony, because the petition is bad, is not allowed the broad office of a timely demurrer. In the science of practice codes a demurrer comes before an answer. The essential object of a demurrer is to avoid issues of fact, and in lieu to invoke a trial on issues of law. But when an answer is in and the issues are made up, what does that mean? It means the sifting of pleadings is over, and that the line of battle is now pitched on the facts at a trial on the merits. Parties litigant thereby announce ready for trial on the merits. Preparation for trial is invited, and expenses and labor follow. Thereafter, and when parties appear in court with their witnesses and the trial is on, a halt of the trial by an objection made to the petition is tolerated but not encouraged by the courts. It is not encouraged because it smacks of an ambush—of lying in wait—and there is an element of untimeliness and unfairness about it. It is tolerated because an answer does not waive such capital and radical defects in a petition, as that it lacks essential averments to a cause of action, and there is no aider by the answer. Such defects may be first challenged in a motion to arrest, and it seems they are jurisdictional and may be raised for the first time in this court. *Hanson v. Neal,* 215 Mo. loc. cit. 278. Hence an objection to testimony on that

ground is tolerated. An objection to the introduction of testimony is never sustained because of a lack of certainty or lack of definiteness in allegation, nor for informality in the statement of an essential fact, nor because a cause of action is defectively stated. Such objection is disallowed if by reasonable intendment, or by fair implication from facts stated, or if by most liberal construction the essential allegation may be got at by inference. The rule to go by in disposing of such objection is the same bland rule applied to ruling on motions in arrest. Wherein the grace of every implication is allowed to aid the verdict, and mere ambiguity in allegation is resolved in its favor.

The several propositions announced lie well within the authorities, for example: *Grove v. Kansas City,* 75 Mo., loc. cit. 675; *Young v. Iron Co.,* 103 Mo., loc. cit. 327; *Donaldson v. Butler County,* 98 Mo., loc. cit. 166; *Haseltine v. Smith,* 154 Mo., loc. cit. 413, 55 S. W. 633; *Broyhill v. Norton,* 175 Mo., loc. cit. 202; *State ex rel v. Delaney,* 122 Mo. App., loc. cit. 243; *Alter v. Frick,* 62 Mo. App. 453; *Murphy v. Insurance Co.,* 70 Mo. App. loc. cit., 82 et seq.

In the *Donaldson case, supra,* BLACK, J., comments on the fact that such objection comes after preparation for trial and "too late to deserve a very favorable consideration." In the *Delaney case, supra,* ELLISON, J., speaks of the right to make such objection as one "which has been expressed to be only tolerated." In the *Haseltine case, supra,* this court speaks by VALLIANT, J., thus: "While the court is bound to sustain an objection of that kind, even at that stage of the case, if it is well taken, yet it does not look with favor on that practice. The fair way is to challenge the sufficiency of the petition by demurrer in the beginning, and if it is adjudged insufficient and is susceptible of amendment, the fault may be corrected. If a party lies in wait for his adversary, the court should not allow him an advantage that he could not have attained in the open field."

In the *Young case, supra,* the petition did not allege the negligence of defendant brought about the injury. In that predicament, as against an objection to the introduction of testimony, this court blandly looked to an averment in the "prayer for relief" to supply the deficiency.[1]

* * * * * * * * * * *

[1] In Roberts v. Taylor (1886), 19 Neb. 184, the court said: "The practice of objecting, on the trial, to the introduction of evidence because the

petition fails to state a cause of action, is not to be encouraged. When the witnesses are in attendance, and a large amount of expense incurred, which would have been avoided had an objection been made by demurrer at the proper time, the court will, if possible, sustain the petition, and, if need be, permit an amendment to be made instanter, to cure the defect."

SECTION 3. WANT OF JURISDICTION.

BELDEN v. WILKINSON.

Appellate Division of the Supreme Court of New York. 1899.

44 New York Appellate Division, 420.

RUMSEY, J.: The plaintiff is a resident of the state of Connecticut. The defendants, who are sued as trustees under the last will and testament of Frank Wilkinson, deceased, are residents of England, of which country Wilkinson, their testator, was also a resident. The complaint alleges that the plaintiff agreed to sell to Wilkinson, and he agreed to buy, a piece of land in the state of Connecticut, of which Wilkinson took possession, and that a portion of the purchase price was still unpaid. It alleges the death of Wilkinson; the appointment of the defendants as his executors and trustees, and that they, as trustees, are in possession of these premises; and contains further allegations, by which it is sought to make the defendants, as trustees, liable for the unpaid purchase money. The defendants demurred to the complaint, upon the ground that the court has no jurisdiction of the persons of the defendants, and no jurisdiction of the subject-matter of the action. At the special term the defendants had judgment upon the demurrer, from which this appeal is taken.

No question is raised as to the sufficiency of the allegations of the complaint to constitute a cause of action. Nor is there any claim that there is a defect of parties defendant. Upon these two points the demurrer admits that the complaint is sufficient, and that the plaintiff would be entitled to recover if the objections stated by the defendants in the demurrer are not well founded.

The objection that the court has no jurisdiction of the

persons of the defendants does not mean that a proper service of the summons has not been made upon them; for such defect, if it exists, can only be taken advantage of on motion. *Nones v. Insurance Co.*, 8 Barb. 541. That ground of demurrer raises only the question whether the defendants are such persons as can be subjected to the process and jurisdiction of the court. *Ogdensburgh & C. R. Co. v. Vermont & C. R. Co.*, 16 Abb. Prac. (N. S.) 249.

The defendants here are not sought to be subjected to the process of the court because of their status as foreign executors, but as trustees under the last will of Wilkinson. As such, they became invested with the title to this real estate by virtue of the will alone, and not because of the decree of any court. *Newton v. Bronson*, 13 N. Y. 587-593; *Conklin v. Egerton's Adm'r*, 21 Wend. 430-436. As trustees under the will, taking title to the estate by virtue of the will, they stand in precisely the same situation as any other grantee of Wilkinson; and it hardly needs the citation of authorities to show that, if the plaintiff had a cause of action, either at law or equity, against a grantee of Wilkinson, arising out of the possession of this land, he could assert it in the courts of this state, if the defendants were found within the jurisdiction. *Cleveland v. Burrill*, 25 Barb. 522; *Smith v. Crocker*, 14 App. Div. 245; *Furbush v. Nye*, 17 App. Div. 325; *Same v. Clarkson*, 17 App. Div. 327.

* * * * * * * * * * *

There can be no doubt, either, that the court has jurisdiction of the subject-matter. The action was brought to recover a sum of money claimed to be due to the plaintiff from the defendants. Of such an action the Supreme Court always has had jurisdiction. It must be remembered that the question of the jurisdiction of the subject-matter presented by this demurrer has nothing to do with the question whether the allegations of the complaint set out a good cause of action upon a subject of which jurisdiction exists. "Jurisdiction of the subject-matter of an action is a power to adjudge concerning the general question involved therein, and is not dependent upon the state of facts which may appear in a particular case, or the ultimate existence of a good cause of action in the plaintiff therein." *Hunt v. Hunt*, 72 N. Y. 217.

For these reasons the demurrer was not well taken, and the judgment entered thereupon must be reversed, and

judgment given to the plaintiff, with costs, with leave to the defendants to withdraw the demurrer and answer upon the payment of costs in this court and in the court below.

VAN BRUNT, P. J., BARRETT, PATTERSON and O'BRIEN, JJ., concurred.

PETERSON v. PANTHEON LUMBER COMPANY.

Supreme Court of Washington. 1911.

62 Washington, 189.

PARKER, J.: This appeal involves only the alleged error of the Superior Court in overruling the demurrer to the complaint. * * * The defendant demurred to the complaint upon the grounds. * * *

"(3) That the court has not jurisdiction of the person of the defendant or of the subject-matter of the action."

Other grounds of demurrer are not here involved. The Superior Court overruled the demurrer, when the defendant elected to stand thereon and declined to plead further. Thereupon the court heard evidence in support of the allegations of the plaintiffs' complaint, made findings of fact and conclusions of law in their favor, and rendered judgment against the defendant accordingly. The defendant has appealed.

* * * * * * * * * * *

It is next contended that the complaint is demurrable upon the ground that it fails to state facts affirmatively showing jurisdiction under section 4854, Ballinger's Ann. Codes and St. (section 310, Pierce's Code), which was in force at the time of the commencement of this action, and provided:

"An action against a corporation may be brought in any county where the corporation has an office for the transaction of business, or any person resides upon whom process may be served against such corporation, unless otherwise provided in this code."

The complaint alleges:

"That the defendant now is and at all times herein mentioned, was a corporation, organized and existing under and

by virtue of the laws of the state of Washington, and engaged in the manufacture of lumber."

There is no other allegation in the complaint showing that the appellant corporation has an office for the transaction of business in Stevens county, or that any person resides in Stevens county upon whom process may be served against such corporation. The holding of this court in *McMaster v. Thresher Co.*, 10 Wash. 148, 38 Pac. 760, is relied upon in support of this contention. *Hammel v. Fidelity Mutual Aid Association*, 42 Wash. 448, 85 Pac. 35, is to the same effect, though not cited by counsel. In those cases the jurisdictional question was raised by petition and motion putting directly in issue the facts upon which jurisdiction depended under section 4854, Ballinger's Ann. Codes and St., and the question of the sufficiency of a complaint which omitted to affirmatively show such facts was in no way involved. The Supreme Court of Indiana dealing directly with the question here involved in the case of *Rudisell v. Jennings*, 38 Ind. App. 403, 77 N. E. 959, said:

"A Circuit Court is a court of general jurisdiction, and it is only when the want of jurisdiction appears on the face of the complaint that a demurrer will lie. In actions in such a court it is not necessary that the complaint should affirmatively show that the court has jurisdiction. If there is nothing in the complaint to show whether the court has or has not jurisdiction, the question cannot be raised by demurrer, as the jurisdiction will be presumed."

See, also, *Currie Fertilizer Co. v. Krish*, (Ky.) 74 S. W. 268; *Powers v. Ames*, 9 Minn. 178 (Gil. 164).

We are of the opinion that the want of jurisdiction does not appear upon the face of this complaint. Therefore that question cannot be raised by demurrer.

* * * * * * * * * * *

We conclude that there was no error committed by the learned trial court in overruling the demurrer, and since appellant stood thereon and declined to plead further the court was authorized to proceed to judgment.

The judgment is affirmed.[1]

RUDKIN, MOUNT, GOSE, and FULLERTON, JJ., concur.

[1] *Accord:* Sanipoli v. Pleasant Valley Coal Co. (1906), 31 Utah 114; Continental Life Ins. Co. v. Jones (1906), 31 Utah 403.

SECTION 4. WANT OF LEGAL CAPACITY TO SUE.

CODDINGTON v. CANADAY.

Supreme Court of Indiana. 1901.

157 Indiana, 243.

DOWLING, J.: This action was brought by the appellee, in his own name, as the receiver of the Citizens' Bank of Union City, Ind., against the appellants and others, who were the directors of that corporation. Its object was to recover damages alleged to have been sustained by the bank by reason of the negligence of the directors, and the gross mismanagement of the financial affairs of the corporation by them. The suit was commenced in the Randolph Circuit Court, the venue afterwards being changed to Delaware county. Motions were made by the appellants to strike out parts of the complaint, to strike out the entire complaint, to separate it into paragraphs, to make it more certain, to strike out the 109th specification, and to make that specification more certain. Appellants Coddington and Smith each demurred to the complaint on the grounds that the court had not jurisdiction of the subject of the action, that plaintiff had not the legal capacity to sue, that there was a defect of parties defendant, that there was a misjoinder of causes of action, and that the complaint did not state facts sufficient to constitute a cause of action. The demurrers were overruled.

* * * * * * * * * * *

The next point made is that the appellee had not the legal capacity to sue. This ground of demurrer under the statute means that the plaintiff is not entitled to sue by reason of some personal disability, or that he has no title to the character in which he sues. It is said in Story, Eq. Pl. § 493: "If an infant or a married woman or an idiot or a lunatic exhibiting a bill appear upon the face of it to be thus incapable of instituting a suit alone, and no next friend or committee is named in the bill, the defendant may demur." An uncertificated bankrupt suing in equity for property which had clearly passed to his assignees, that fact appearing on the face of the bill, is cited as an example of an action by a

person under a legal disability; and an administrator suing in virtue of the grant of administration in a foreign country, and an unincorporated company suing as a corporation, are mentioned as examples of actions in which there is a defect in the title of the plaintiff to the character in which he sues. This court has decided in many cases that the want of legal capacity to sue, which is made a cause of demurrer, has reference to some legal disability of the plaintiff, such as infancy, idiocy or coverture, and not to the fact, if such be the fact, that the complaint upon its face fails to show a right of action in the plaintiff. *Debolt v. Carter,* 31 Ind. 355, 363; *Dale v. Thomas,* 67 Ind. 570, 572; *Nave v. Hadley,* 74 Ind. 155, 156; *Dewey v. State,* 91 Ind. 173; *Traylor v. Dykins,* Id. 229; *Pence v. Aughe,* 101 Ind. 317; *Board v. Kimberlin,* 108 Ind. 449; *Campbell v. Campbell,* 121 Ind. 178.

Is there here any defect of the title of the plaintiff to the character of receiver, in which he sues? A receiver may be appointed when a corporation is insolvent or is in imminent danger of insolvency. Burns' Rev. St. 1901, § 1236, subd. 5.

* * * * * * * * * * *

It appears from the complaint that the Citizens' Bank was a bank of discount and deposit, organized under the statutes of this state; that it became insolvent, and that the auditor of state, after taking charge of it made application to the judge of the Randolph Circuit Court, by suit, for the appointment of a receiver. It is further shown that the appellee was appointed such receiver; that he accepted the appointment, gave bond, and took the oath prescribed by law. By the terms of the statute he was empowered, under the control of the court, or of the judge thereof in vacation, to bring and defend actions, to take and keep possession of the property, to receive rents, collect debts in his own name, and generally to do such acts respecting the property as the court or judge might authorize. Burns' Rev. St. 1901, § 1242.

* * * * * * * * * * *

The allegations of the complaint sufficiently show that the plaintiff is under no personal disability, and that there is no defect in his title to the character in which he sues. Under the circumstances set forth in the pleading, the appointment of the receiver was authorized by the statute,

and the terms of the order of the court were comprehensive enough to authorize him to prosecute the present action.

* * * * * * * * * * *

Finding no error, the judgment is *affirmed.*

LOS ANGELES RAILWAY COMPANY v. DAVIS.

Supreme Court of California. 1905.

146 California, 179.

MCFARLAND, J.: This is an action to quiet title to certain land. Defendants demurred to the complaint upon the general ground that it does not state facts sufficient to constitute a cause of action, no other ground of demurrer being stated. The demurrer was overruled. Defendants then answered, denying plaintiff's title to the land, and setting up title in themselves. The court found for the plaintiff, and rendered judgment accordingly. Defendants appealed from the judgment upon the judgment roll.

The only point made by appellants for a reversal is that the complaint does not contain an averment that plaintiff is a corporation. The fact as to this contention is that, while in the title of the case, as it appears at the commencement of the complaint, the plaintiff is designated as "a corporation," there is no averment in the body of the complaint of plaintiff's corporate existence. The court found that plaintiff was a corporation.

Waiving other questions discussed by counsel, we are satisfied that the point sought to be made by appellants is not raised by the general demurrer. The point that plaintiff was not a corporation goes only to its capacity to maintain an action, and not to the sufficiency of the facts averred to constitute the alleged cause of action; and therefore it could be raised by demurrer to the complaint only under subdivision 2 of section 430 of the Code of Civil Procedure, which provides as a cause of demurrer "that plaintiff has not legal capacity to sue," and then only where said want of capacity "appears on the face" of the complaint. If it

does not so appear, the objection must be taken by answer pursuant to section 433.

There are some authorities which appear to support appellants' contention, and the principal one cited by them is *Miller v. Pine Mining Co.,* (Idaho) 31 Pac. 803, 35 Am. St. Rep. 290; but in the notes to the case the author of the work, after expressing his disapproval of the doctrine announced therein, cites a multitude of cases holding the other way. We will notice only the first case cited by the author—*Phœnix Bank v. Donnell,* 40 N. Y. 410—because it has more than once been referred to and approved by this court. In that case there was no averment in the complaint that the plaintiff was a corporation, and it is not even called a corporation in the title, and the demurrer there was upon the ground that it appeared that "plaintiff has no legal capacity to sue," and also upon the general ground that it did not state facts sufficient to constiute a cause of action. (Section 144 of the New York code [Voorheis Code 1868] is the same as section 430 of our code [Code Civ. Proc.] and section 147 the same as our section 433.) The demurrer was overruled in the lower court, and the judgment was affirmed in the Court of Appeals. As to the first ground of demurrer the court said: "All that the argument proves is that the complaint does not show upon its face, affirmatively, that the plaintiff has capacity to sue. But to sustain the demurrer the code requires that it should appear upon its face that it had not such capacity, which in no respect appears. For aught appearing upon the face of the complaint, the plaintiff may be a corporation entitled to sue as such. Section 147 provides that, when any of the matters enumerated in section 144 do not appear upon the face of the complaint, the objection may be taken by answer. This would seem to indicate the proper practice with sufficient clearness. If it appears upon the face of the complaint that a plaintiff suing as a corporation is not such in fact, a demurrer is the proper remedy of the defendant under section 144. If the complaint does not show that the plaintiff is not a corporation on its face, the objection that it is not such must be taken by answer, under section 147. This would seem to render further discussion of the question unnecessary." With respect to the second ground of demurrer in that case—which is the only ground in the case at bar—the court says: "The appellant's counsel insists that,

if the demurrer is not sustainable upon the second ground specified in section 144, it is upon the sixth. In this, the counsel is in error. That relates only to the statement of facts constituting the cause of action. If this statement fails to show a right of action, then a demurrer on this ground may be interposed. But it has no application to the capacity of the plaintiff to sue or to the other grounds of demurrer specified."

This case was expressly approved, and the rule there stated declared to be right, by this court in *Swamp Land District No. 110 v. Feck,* 60 Cal. 403. In that action the plaintiff was designated in the title of the case as "Swamp and Overflowed Land Reclamation District No. 110 of the State of California," but there was no averment in the complaint that plaintiff was ever a swamp and overflowed land district, and for this omission the complaint was demurred to because it did not state facts sufficient to constitute a cause of action. (There was also a second cause of demurrer—that two separate causes of action had been improperly united.) The court said: "The first ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action. The objections specified are in substance that it does not appear from the complaint that the plaintiff was ever duly created a swamp and overflowed land district. That objection, however, if well taken, would go to the legal capacity of the plaintiff to sue, and not to the sufficiency of the facts stated to constitute a cause of action. *Phœnix Bank v. Donnell,* 40 N. Y. 410." And the court, following the New York case, said further: "A demurrer on the ground that the plaintiff has not legal capacity to sue would be bad, because it does not appear upon the face of the complaint that the plaintiff has not. It is not a good ground of demurrer that it does not appear in the complaint that the plaintiff has the legal capacity to sue. That omission can only be taken advantage of by answer. Code Civ. Proc. § 432; *Phœnix Bank v. Donnell, supra.*" In *Miller v. Luco,* 80 Cal. 257, 22 Pac. 195, the said case of *Swamp Land District v. Feck* is expressly approved, and quotations made from it which refer to *Phœnix Bank v. Donnell;* and the same thing occurs in *Wilhoit v. Cunningham,* 87 Cal. 458, 25 Pac. 675.

Appellant cites, as supporting a different rule, *Oroville, etc., v. Plumas Co.,* 37 Cal. 360, *Loup v. Cal. So. R. R. Co.,* 63

Cal. 97, and *People v. C. P. R. R. Co.*, 83 Cal. 395, 23 Pac. 303. In the *Oroville Case* the legal existence of the plaintiff as a corporation was denied in the answer, and no question as to the sufficiency of the complaint was involved. In the *Loup Case* the author of the leading opinion, after holding that the demurrer to the complaint ought to have been sustained for various other reasons, merely adds, as a sort of further assurance, that "in the fourth count of the complaint there is no averment of the defendant's corporate existence;" but no one of the other justices concurred in that expression. In *People v. C. P. R. R. Co.*, 83 Cal. 393, 23 Pac. 303, the writer of the main opinion, after holding that the demurrer to the complaint was properly sustained upon various grounds which are elaborately discussed, does say that "an averment of defendant's corporate existence is necessary in every count of the complaint against a corporation"—citing the *Loup Case;* but there is no discussion of the question, and no reference to the cases above referred to, where the question was directly before the court and expressly adjudicated, approving and restating the rule announced in *Phœnix Bank v. Donnell.* The sentence quoted was not necessary to the decision, and it cannot be taken as overruling those cases. Moreover, *Wilhoit v. Cunningham,* 87 Cal. 458, was the latest declaration of the court on that subject. And we are satisfied that in *Swamp Land District No. 110 v. Feck,* 60 Cal. 403, and in the subsequent cases approving it above cited, the rule is correctly declared.

Under the above views, it is not necessary to consider respondent's discussion of "aider by verdict" and other points made by it.

The judgment appealed from is *affirmed.*

LORIGAN, J. and HENSHAW, J., concurred.

PAGE WOVEN WIRE FENCE COMPANY v. JOSLIN.

Supreme Court of Colorado. 1906.

38 Colorado, 162.

Mr. Justice BAILEY delivered the opinion of the court:

Plaintiff in this action filed a complaint against the defendant, seeking to recover upon a letter of credit issued to plaintiff by defendant in favor of one A. H. Gutheil. To this complaint the defendant filed a demurrer on the ground that it did not "state facts sufficient to constitute a cause of action against defendant." This demurrer was sustained by the county court, and plaintiff appealed.

Two reasons, neither of which is sound, are urged in support of the sustaining of the demurrer. * * *

The other contention of appellee is that the complaint contains no allegation that the appellant, a foreign corporation, had compiled with the statute (sections 4, 10, c. 52, Sess. Laws 1901) under which it could prosecute this action.

Of the seven grounds of demurrer permitted by the Mills' Ann. Code of Civil Procedure, section 50, the second is "that the plaintiff has no legal capacity to sue." The sixth is "that the complaint does not state facts sufficient to constitute a cause of action."

The contention that the complaint fails to show that the appellant had complied with the statute under which it could prosecute this action is one which challenges plaintiff's capacity to sue. Section 51 of the Mills' Ann. Code provides that the demurrer shall distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it does so, it may be disregarded. In relation to this section, we have heretofore held that the first and sixth grounds of demurrer only can be stated in the language of the code without the reason being stated. *Henderson v. Johns*, 13 Colo. 280, 22 Pac. 461.

* * * * * * * * * * *

The omission to allege in the complaint that the plaintiff had complied with sections 4, 10, c. 52, Sess. Laws 1901, can relate only to its capacity to sue, and was not one of the facts necessary to constitute plaintiff's cause of action, and hence would afford no ground for demurrer under sub-

division 6 of section 50 of the Mills' code. *G. Ober & Sons v. Blalock,* (S. C.) 18 S. E. 264; *Cone Export. & Com. Co. v. Poole,* (*S. C.*) 19 S. E. 203, 24 L. R. A. 289.

We must not be understood as holding that under the allegations of this complaint a demurrer upon the ground that the plaintiff has not capacity to sue should be sustained. That question is not before us. Defendant did not see fit to rest his demurrer upon that ground. What we do say is that the question of the capacity of plaintiff to institute an action is not raised by a demurrer that the complaint fails to state facts sufficient to constitute a cause of action.

The court erred in sustaining the demurrer, and the judgment will be reversed.

Reversed.

Chief Justice GABBERT and Mr. Justice GODDARD, concur.

SECTION 5. ANOTHER ACTION PENDING.

WETZSTEIN v. BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY.

Supreme Court of Montana. 1903.

28 Montana, 451.

Mr. Justice HOLLOWAY delivered the opinion of the court:

This action was commenced in the District Court of Silver Bow county, Mont., to secure a decree establishing plaintiff's title to an undivided one-fourth interest in the Comanche mining claim, to have the defendant declared to hold the same as trustee for the benefit of the plaintiff, to compel the conveyance of such interest to him, and to secure the appointment of a receiver to work the property, an injunction to restrain defendant from converting to its own use ores taken from plaintiff's alleged one-fourth interest in the claim, and for an accounting by the defendant for ores extracted from the claim from the time it came into possession of the same. The complaint sets forth at length the history of the Comanche mining claim, and, among other

things, alleges that it was located in 1879 by Turner and Upton; that Largey, Zenor, and Bielenberg succeeded to Turner's interest; that Upton conveyed a one-fourth interest in the claim to Tong, and afterward a one-fourth interest to H. L. Frank, who conveyed the same to this plaintiff; that, while Upton continued to own a one-fourth interest in the property, Tong, Largey, Zenor, and Bielenberg wrongfully and fraudulently, and with intent to acquire for themselves the right to Upton's undivided one-fourth interest in the claim, made application for patent, and in said application fraudulently omitted and excluded Upton's name; that they received a patent, organized the Comanche Mining Company, and assumed to convey the entire property to such company, which had actual notice of plaintiff's alleged claim of interest therein; that this plaintiff in 1894 commenced an action in the district court of Silver Bow county against the Comanche Mining Company, Largey, Zenor, Bielenberg, Warren, and Tong, to have them declared trustees of an undivided one-fourth interest in the property for his benefit, and to require a conveyance of such interest to him; that on the date of the commencement of such action plaintiff filed with the county clerk and recorder of Silver Bow county, where the property was located, a notice of *lis pendens;* that such action was tried on its merits, and a decree entered adjudging that this plaintiff had no right, title, or interest in the property whatever; that from such decree and an order denying his motion for a new trial he appealed to the Supreme Court; that such appeal was still pending undetermined in the Supreme Court at the date of the commencement of this action; that, in addition to the notice conveyed by the notice of *lis pendens,* this defendant had actual notice of the claim of this plaintiff, but notwithstanding such notice, in 1896 it assumed to purchase from the Comanche Mining Company the entire property, and immediately thereafter went into possession and commenced to extract large quantities of ore from the same. To this complaint the defendant interposed a demurrer upon the following, among other grounds: (2) That another action is pending between the same parties for the same cause; and (3) that the complaint does not state facts sufficient to constitute a cause of action. This demurrer was by the court sustained, and, the plaintiff declining to amend, judg-

ment was entered in favor of defendant for its costs, from which this appeal is prosecuted.

Section 680 of the Code of Civil Procedure provides that a demurrer may be interposed to a complaint upon the following ground: "(3) That there is another action pending between the same parties for the same cause." In order to invoke successfully this ground of demurrer, it must appear from the face of the complaint (1) that another action is pending, (2) that it is between the same parties, and (3) that it is for the same cause.

1. Section 1895 of the Code of Civil Procedure provides that an action is pending from the commencement thereof until the final determination on appeal, or until the time for appeal has expired, unless the judgment has been sooner satisfied. It appears from the complaint that at the date of the commencement of this action the former action was before the Supreme Court undetermined on appeal, and was therefore then pending within the meaning of subdivision 3 of section 680, *supra*. This is the view taken of a like provision by the Supreme Court of California in *Fisk v. Atkinson*, 71 Cal. 452, 10 Pac. 374, 12 Pac. 498.

2. The plaintiff in each action is admittedly the same. It appears from the complaint that the defendant in this action is the successor in interest of the defendants in the former action; that it purchased the property pending such litigation, and, in addition to the knowledge brought home to it by the notice of *lis pendens*, it had actual notice of plaintiff's claim of interest at the date it purchased the property, and this successive interest or relationship to the same right of property constituted this defendant a privy of the defendants in the former action. The very purpose of *lis pendens* is, and indeed the very purpose which the plaintiff must have had in filing such notice was, to bind any subsequent purchasers, by the decree which he might obtain in the action, to the same extent as though actually parties to the litigation; and the reason of the rule that the term "parties," as used in subdivision 3 of section 680, *supra*, includes privies, then becomes apparent, and this we understand the rule to be. 1 Cyc. 33; 21 Enc. Law (2d Ed.) 602; *Crane v. Larsen*, 15 Or. 745, 15 Pac. 326; *Holloway v. Holloway*, 103 Mo. 274, 15 S. W. 536. Applying this test, it is obvious that the parties to

this and the former action are the same within the meaning of section 680, above.

3. Was the former action for the same cause as the present one? That action was brought to have the defendants declared to hold an undivided one-fourth interest in the Comanche claim in trust for the plaintiff, and, primarily, the present action is brought for the same purpose and to secure the same result. The claim made by the plaintiff in each action is the same, based upon the same assertion of title, and none other. As incidents to this primary relief, and dependent absolutely upon this particular claim of title, the plaintiff in this action asks for an injunction, the appointment of a receiver, and an accounting. The general rule for determining the question now under consideration is, if in the former action a judgment had been obtained upon the merits, and that judgment had become final, it could be pleaded in bar of this action. 1 Cyc. 28; *Damon v. Denny,* 54 Conn. 253, 7 Atl. 409; *Mullen v. Mullock,* 22 Kan. 598. Or, stated in other words, could the plaintiff in the former action have obtained all the relief which he alleges he is entitled to in the present action? If so, he will be required to exhaust his remedy in that action, and will not be permitted to harass or annoy the defendant by maintaining this one. There is reason for this rule; for, if the plaintiff failed in the former action and was declared to have no interest whatever in the property, then he could not maintain this action, and the decree in the former would be an absolute bar to this, for his claim of right is based upon the same alleged title in each instance. If he prevailed in the former action, the defendant in this one, having purchased with actual knowledge of his alleged claim, would be bound by such decree to the extent, at least, which it established the plaintiff's interest in the property and afforded him ancillary relief by way of injunction or the appointment of a receiver, and therefore, under such circumstances, this action to that extent would be entirely useless; for, if he is entitled to an injunction or the appointment of a receiver in this action, he was equally entitled to such relief in his former suit.

But it is contended that the plaintiff is entitled to an accounting by the defendant company for ores extracted since it came into possession of the property, and to that extent, at least, the causes of action are not the same. This

gives rise to the inquiry: Does the complaint state facts sufficient to constitute a cause of action for an accounting? It is conceded that the defendant is the owner of an undivided three-fourths interest in the claim in controversy, and therefore no wrong can be imputed to its possession of the common property. In order to change the character of such occupation, the plaintiff must have been wrongfully denied participation in the fruits of the mining operations carried on to the extent of his interest. If he had received his alleged share of the proceeds no complaint could be made upon this branch of the case, or, if he knew or had the means of knowing just what such share actually amounted to, he would have no cause of action for an accounting; for the law does not assume to do for parties that which they may rightfully do for themselves, and particularly does not encourage needless controversies in the courts. The gist of an action for an accounting is the inability of the plaintiff to procure the same himself, and the refusal of the defendant to render such accounting to him; and this suggests the rule, general in its application, though apparently seldom announced, that a demand by the plaintiff for an accounting and a denial thereof by the defendant are necessary prerequisites to be pleaded and proved, in order to maintain an action or an accounting. 1 Enc. Pldg. and Prac. 98; *Jolly v. Bryan,* 86 N. C. 457; *Smith v. Lawrence,* 26 Conn. 467; *Southworth v. Smith,* 27 Conn. 355, 71 Am. Dec. 72; *Kennicott v. Leavitt,* 37 Ill. App. 435. In the absence of an allegation of demand and refusal, we are of the opinion that the complaint does not state facts sufficient to constitute a cause of action for an accounting, and, as the plaintiff could have obtained in the former action all other relief which he claims for himself in this, we hold that at the date of the commencement of this action the former action was then pending between the same parties for the same cause, and in sustaining the demurrer the lower court committed no error. The judgment is affirmed.

Affirmed.[1]

[1] *Another action pending cannot be urged under a general demurrer for want of facts.* In Basye v. Basye (1898), 152 Ind. 172, the court said: "If a complaint states facts sufficient to constitute a cause of action, and also sets forth facts that make out a defense in bar, a demurrer for want of facts should be sustained. But the defense of a former action pending is not in bar. It is in abatement merely. If the complaint exhibits a ground for

abatement, the demurrer should be framed and addressed accordingly. . . . The case of Rose v. Rose, 93 Ind. 179, 185, in so far as it might be considered an authority to the contrary, is overruled."

SECTION 6. DEFECT AND MISJOINDER OF PARTIES.

KUCERA v. KUCERA.

Supreme Court of Wisconsin. 1893.

86 Wisconsin, 416.

This action was brought to redeem the premises described in the complaint from a mortgage thereon held by the defendants. The plaintiffs allege that they are now the owners in fee of the premises, and that they had tendered to the defendants the amount secured by the bond and mortgage, and are now ready to pay the money into court, etc. The defendants made answer to the complaints as to the plaintiff John Srnka, and as to the plaintiff Mollie Kucera they demurred thereto, "in so far as it relates to or attempts to state a cause of action in favor of the plaintiff Mollie Kucera and against these defendants, for the reason that it appears upon the face of the complaint that the same does not state facts sufficient to constitute a cause of action in favor of said Mollie Kucera against the defendants." The defendants appealed from an order overruling the demurrer.

PINNEY, J.: The demurrer in this case is of a somewhat anomalous character, and presents the question whether, where an action is brought by two or more plaintiffs, the defendant may demur to the complaint in so far as it relates to one of the plaintiffs only, for the reason that it does not state facts sufficient to constitute a cause of action in favor of such plaintiff and against the defendants, it being conceded that the complaint does state facts sufficient to warrant a recovery in favor of the other plaintiff.

The ground of demurrer specified by subdivision 6, § 2649, Rev. St., "that the complaint does not state facts sufficient to constitute a cause of action," must, as in other cases, be specified "in the language of the subdivision of section 2649 relied upon." A demurrer so limited and qualified as this

does not seem to be allowed by the statute, but had it been in the general language of subdivision 6, under repeated decisions of this court, from which we see no reason to depart, it must have been overruled. The objection is, in substance, that there is a misjoinder or excess of parties plaintiff. The statute does not permit a demurrer upon the ground that there is a misjoinder of parties plaintiff or defendant. This is not a defect of parties, within subdivision 4, § 2649. Misjoinder and excess or superfluity of parties are identical. *Read v. Sang,* 21 Wis. 687. That a misjoinder or excess of parties defendant is not the ground of demurrer has been expressly ruled in *Great Western Compound Co. v. Aetna Ins. Co.,* 40 Wis. 373; *Murray v. McGarigle,* 69 Wis. 484, 34 N. W. 522. But the defendants so improperly joined may demur separately on the ground that the complaint does not state facts sufficient to constitute a cause of action. *Arzbacher v. Mayer,* 53 Wis. 380, 10 N. W. 440. In *Read v. Sang, supra,* it was held that the objection that the wife had been improperly joined as a plaintiff with her husband in an action in which the entire interest was in him was allowed for the peculiar reason that no judgment could be given in favor of the defendant in such case against the wife. In *Willard v. Reas,* 26 Wis. 540, it was held that a demurrer for excess of parties plaintiff is bad if one of them is entitled to judgment against the defendant; and *Marsh v. Waupaca Co.,* 38 Wis. 250, is to the same point. In *Schiffer v. City of Eau Claire,* 51 Wis. 385, 393, 8 N. W. 253, a demurrer by a defendant to the complaint on the ground that, as to one of the plaintiffs it did not state facts sufficient to constitute a cause of action, was overruled. And in *Boyd v. Beaudin,* 54 Wis. 194, 11 N. W. 521, it was held that the joinder of a plaintiff who has no interest is not a ground of demurrer. In *Nevil v. Clifford,* 55 Wis. 161, 166, 12 N. W. 419, it was held that, under a general demurrer that the complaint does not state facts sufficient to constitute a cause of action, the fact that there is a misjoinder of parties plaintiff cannot be considered. It is therefore well settled in this state that a demurrer on this ground cannot be allowed.

The case of *Palmer v. Davis,* 28 N. Y. 247, is cited as justifying the demurrer in question, and that conclusion is sustained by the subsequent case of *People v. Crooks,* 53 N. Y. 648. These cases, while holding that a misjoinder

of parties plaintiff is not a ground of demurrer, hold that any special demurrer, such as this is in fact, may be sustained on the ground that the complaint does not, *as to one of the plaintiffs,* state a cause of action, and that the objection may also be raised at the trial, when the complaint will be dismissed as to such plaintiff, but that it will be no ground for dismissal of the complaint as to both plaintiffs. It is worthy of notice that the amended or new code in New York, adopted since these cases were decided (section 488), has specified as a distinct ground of demurrer "that there is a misjoinder of parties plaintiff or defendant." As the defendants can avail themselves of the objection to its full extent at the trial, and there can be but one final judgment in the action, the right to have the objection allowed on demurrer cannot be a matter of much practical advantage or importance, and, at best, could result only in an order that could not be carried into effect until after a trial as to the other plaintiff. We will adhere to the rule as already settled until, as in New York, the legislature shall change it. If the complaint states a good cause of action in favor of Mollie Kucera, it is not denied but that the demurrer was properly overruled. If it does not state facts sufficient to constitute a cause of action in her favor as against them, it is difficult to see how the defendant can be prejudiced, or said to have been aggrieved, by the order appealed from.

It must therefore be regarded as settled, in this state at least, that the question of misjoinder of plaintiffs, or whether the complaint, as to one or more of several plaintiffs, states a cause of action against the defendants, cannot be raised by demurrer, under any of the grounds allowed by section 2649, Rev. St. For these reasons the order of the Circuit Court must be affirmed, and the cause remanded for further proceedings according to law.

BY THE COURT: It is accordingly ordered.

GARDNER v. SAMUELS.

Supreme Court of California. 1897.

116 California, 84.

HARRISON, J.: The plaintiff leased from the defendant Samuels, November 18, 1886, a tract of land in Napa county, for the term of three years from May 2, 1887, and entered into possession of said land at the commencement of the term, and at its expiration, May 2, 1890, surrendered the premises to the defendant. The lease contained the following agreement: "It is further mutually covenanted and agreed by and between said parties that said party of the second part may at any time prior to the going into effect of this lease go upon said premises to make such improvements as he shall deem necessary, and said party of the first part, for himself, his heirs, administrators, and assigns, agrees to pay unto said party of the second part, at the expiration of this lease, for any and all improvements placed upon said premises by said party of the second part, not to exceed the sum of $1,500," with provision for the determination of the value by agreement or by arbitration. In pursuance of this agreement the plaintiff made certain improvements of a permanent nature upon the land, which at the expiration of the term were of the value of $2,200. The defendant Morris became the owner of the land on the 10th day of November, 1891, and since that time has been the owner and in possession thereof, and before he purchased the same had full notice that the plaintiff had made these improvements, and also of the agreement by Samuels to pay him therefor, and of his failure to make such payment. At the expiration of the term Samuels refused to agree with the plaintiff upon the value of the improvements, or to pay him anything therefor, and in April, 1894, the plaintiff requested Samuels, and also the defendant Morris, to submit the determination of their value to arbitration, as provided in the lease, and named an arbitrator therefor, but they each refused either to submit the same to arbitration, or to pay for said improvements. Plaintiff thereupon brought the present action to recover from Samuels the sum of $1,500, and that it be de-

creed to be a lien upon the land so leased, and for a sale thereof in satisfaction of said lien. The defendants severally demurred to the complaint for want of facts to constitute a cause of action, and also for a misjoinder of parties defendant; each specifying in his demurrer that he was improperly joined with the other. The court sustained the demurrers, and from the judgment entered thereon the plaintiff has appealed.

* * * * * * * * * *

3. The complaint sufficiently states a cause of action against the defendant Samuels. It is urged by the respondent, however, that the demurrer of Samuels was properly sustained by reason of the misjoinder of Morris with him as co-defendant. The provision authorizing a demurrer for the misjoinder of parties defendant is taken from the system of equity pleading which formerly prevailed. Under that system such demurrer could be interposed only by the party who was improperly made a defendant. A defendant against whom there was a sufficient complaint could not object that others who had no interest in the subject-matter of the suit were made defendants, unless it also appeared that his interests were affected thereby. Story, Eq. Pl. § 544; Beach, Mod. Eq. Prac. §§ 80, 254; *Cherry v. Monro,* 2 Barb. Ch. 618. This ground of demurrer is authorized by the code of Missouri, and it is held in that state that the former rule in equity is to be followed. *Ashby v. Winston,* 26 Mo. 210. Another rule of pleading prescribed by the code, which is also taken from the equity system, is the provision of section 379, Code Civ. Proc.: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein." The "controversy" here named is the claim for relief made by the plaintiff against the defendants, which he sets forth in his complaint. In the present case this claim is to have the amount of his demand against Samuels for the value of the improvements placed upon the land declared to be a lien thereon, and to have the land sold for its payment. As Morris is alleged to have an interest in the land, he is a necessary party to the determination of such an action, and he cannot be said to be improperly joined as a defendant, even though the complaint does not sufficiently state an affirmative cause of

action against him. If the relief sought by a plaintiff by reason of the cause of action as framed in his complaint would render all of the persons named as defendants proper parties to entitle him to such a relief, a defendant against whom a sufficient cause of action is stated cannot demur for misjoinder of defendants because the complaint does not sufficiently state a cause of action against another defendant. "It is only where the complainant has some ground of relief against each defendant, and where his claims for relief against them respectively are improperly joined in one suit, so as to make the bill multifarious, that each defendant has the right to demur upon the ground that the other defendants are improperly joined with him in the suit." *Cherry v. Monro,* 2 Barb. Ch. 627. In an action to foreclose a mortgage the mortgagor cannot demur for the misjoinder of a defendant whose alleged claim does not appear to constitute a lien upon the mortgaged lands, nor can the maker of a promissory note demur to a complaint against him and the indorser for the misjoinder of the indorser because the complaint fails to state facts sufficient to bind the latter. The judgment is reversed, and the court below is directed to overrule the demurrer of the defendant Samuels, with leave to him to answer within such time as it may designate.

VAN FLEET, J., and GABOUTTE, J., concurred.

WEBER v. DILLON.

Supreme Court of Oklahoma. 1898.

7 Oklahoma, 568.

BURWELL, J.: The plaintiffs in error, numbering over 450, commenced an injunction suit in the district court of Blaine county, against John H. Dillon, the county treasurer, to enjoin the collection of a portion of the taxes levied for the year 1897. * * *

* * * * * * * * * * *

The second and third counts in the demurrer are that there is a misjoinder of causes of action, and that there is

a misjoinder of parties plaintiff. Misjoinder of parties plaintiff is not a ground for demurrer under our practice. Section 89 of chapter 66 of the Code of Civil Procedure (St. Okl. 1893) provides: "The defendant may demur to the petition only when it appears upon its face, either: (1) That the court has no jurisdiction of the person of the defendant, or the subject of the action; (2) that the plaintiff has no legal capacity to sue; (3) that there is another action pending between the same parties for the same cause; (4) that there is a defect of parties, plaintiff or defendant; (5) that several causes of action are improperly joined; (6) that the petition does not state facts sufficient to constitute a cause of action." It will be seen from the foregoing section that the third count of defendant's demurrer, on the ground of a misjoinder of parties, does not come within the provisions of this section. If there are too many parties plaintiff, or persons are made plaintiffs who are not interested in the subject-matter of the action, and are not proper parties plaintiff, the error must be corrected in some other way. In *McKee v. Eaton,* 26 Kan. 226: "Where there is a misjoinder or an excess of parties plaintiff, there is not a defect of parties. A demurrer on account of defect of parties plaintiff is given by law only for a defect, and not for an excess." This is not a proper ground for demurrer; and, while the order and judgment of the trial court does not show on what ground the demurrer was sustained, we take it that it must have been upon the ground that there were several causes of action improperly joined. Our statute authorizes a demurrer if there is a defect of parties plaintiff or defendant. A demurrer on this ground will lie only where some necessary party has not been made a party to the suit. It cannot reach a misjoinder of parties. *Stiles v. City of Guthrie,* 3 Okl. 26, 41 Pac. 383.[1]

* * * * * * * * * * *

[1] *Accord:* Dolan v. Hubinger (1899), 109 Iowa, 408; Union Pac. Ry. Co. v. Smith (1898), 59 Kan. 80; Mader v. Plano Mfg. Co. (1903), 17 S. D. 553.

JAEGER v. SUNDE.

Supreme Court of Minnesota. 1897.

70 Minnesota, 356.

COLLINS, J.: Appeal from an order overruling a demurrer, general and special, to a petition or complaint filed in a proceeding instituted to enforce the liability of stockholders by a receiver of an insolvent banking corporation, appointed as such receiver under the provisions of Laws 1895, c. 145, § 20. All of the assignments of error, save the third, have been disposed of in *Ueland v. Haugan,* 73 N. W. 169.

The third ground of demurrer was in these words, "That there is a defect of parties defendant in said action," and the third assignment refers to this ground.

The demurrer itself was insufficient, for it should have specially pointed out what the defect was, and who were the necessary parties. This was the ancient and salutary rule of chancery practice. In a demurrer for want of parties, the defendant must point out the necessary parties by name or otherwise. *Dias v. Bouchaud,* 10 Paige 455; Story, Eq. Pl. § 543, and note; 1 Daniell, Ch. Prac. § 584, and note. The code has not abrogated this wholesome rule, for there is nothing in its language indicating such an intention. *Baker v. Hawkins,* 29 Wis. 576; *Murray v. McGarigle,* 69 Wis. 483, 34 N. W. 522.

The rule is enforced in Indiana. *Durham v. Bischof,* 47 Ind. 213; *Leedy v. Nash,* 67 Ind. 311. It prevailed generally in New York for many years after the adoption of the code. Van Santv. Pl. 672, 714. Later there was a disposition to relax it, and to hold that a demurrer was sufficient if in the language of the statute. The rule was so just and beneficial that in 1877 it was incorporated into the code. 7 Wait, Prac; Code Civ. Proc. § 490.

So that under the code, as under the old chancery practice, a demurrer for defect of parties defendant is bad if it does not in some suitable manner point out the persons who ought to be made defendants. In conclusion, we call attention to *Graham v. City of Minneapolis,* 40 Minn. 436, 42 N. W. 291, in which a demurrer for defect of parties de-

fendant was interposed. The opinion fails to so state, but an examination of the paper book shows that the able practitioner who drew the demurrer followed the rule referred to, and by name pointed out the person who should have been made a defendant.

Order affirmed.[1]

[1] *Accord:* State ex rel. v. Metscham (1896), 32 Ore. 372; Boseker v. Chamberlain (1903), 160 Ind. 114; Emerson v. Schwindt (1900), 108 Wis. 167; Johnson v. Gooch (1894), 114 N. C. 62.

RANDALL v. JOHNSTONE.

Supreme Court of North Dakota. 1910.

20 North Dakota, 493.

Action by Samuel Randall and another against John Johnstone. From an order overruling a demurrer to the complaint, defendant appeals. Affirmed.

CARMODY, J.: The complaint in its first paragraph sets out in full a contract of sale dated January 15, 1906, between the Golden Valley Land & Cattle Company and defendant, of section 11, township 138, range 106, Billings county, N. D., which contract is signed by the defendant and by Carrie Johnstone, although her name is not mentioned in the body of the contract; * * * The prayer for relief asks that the contract be canceled of record; that the defendant be required to surrender the same to plaintiffs. * * *

To this complaint defendant demurred on the following grounds: (1) That said complaint shows that there is a defect in parties defendant, in that Carrie Johnstone is a necessary party defendant in this action. * * *

The court made an order overruling said demurrer, from which order defendant appeals to this court.

Appellant claims that Carrie Johnstone has rights at issue in this action, and that she became bound by signing the contract even though not mentioned in the body of the instrument. Whether she has rights under the contract is not material to a decision herein. The rule laid down in

30 Cyc. 140, is as follows: "A demurrer for nonjoinder of parties will not be sustained unless it appears that the demurrant has an interest in having the omitted party made defendant, or is in some way prejudiced by the omission."

A party sued may undoubtedly insist that another party ought also to be sued with him. But, to sustain a demurrer on this ground, it must appear that the party demurring has an interest in having such other party made defendant. As a general rule the plaintiff may choose for himself what persons he will make defendants. So far as it can, without prejudice to the rights of others, the court will determine the controversy between the parties before it, and, when it cannot be done, it will take measures to have the necessary parties brought in. It is not often that a demurrer will lie for a nonjoinder of defendants. Before the defendant can sustain a demurrer on account of a nonjoinder of a defendant, he must show that his interest requires that such person should be made a party to the litigation.

It is clearly settled that, although the court perceives that there are persons who should be made parties in order to a complete determination of the controversy, yet, unless it is made affirmatively to appear that the party demurring is to be prejudiced by the omission to make such parties defendants, the demurrer must be overruled. The remedy is not by demurrer, but by motion, or the court can voluntarily order such parties joined in the action, where the necessity arises. Now, in this case, what possible interest has the defendant in having Carrie Johnstone made a party? His case cannot be improved thereby, and, if not, then upon this ground alone the demurrer fails. The complaint does not show that Carrie Johnstone has any interest in this land; but, even if she has, the decree of the court when she is not a party to the action will not be binding upon her, and whatever rights, if any, she has, can be protected by herself in an adequate proceeding. *Stockwell v. Wager*, 30 How. Prac. (N. Y.) 271; *Summers v. Moore*, 115 N. C. 700, 20 S. E. 714; *Dalrymple v. Security Loan & Trust Company*, 9 N. D. 306, 83 N. W. 245.

In *Dalrymple v. Security Loan & Trust Co., supra*, which was an action to quiet title, the defendants demurred to the complaint on the ground, among others, that there was

a defect of parties defendant. The court says: "There is, however, unanimity in the decisions to the effect that a demurrer for defect of parties cannot be sustained unless the demurrant has an interest in having the omitted party joined, or that he is prejudiced by the nonjoinder"—and cites Bliss on Code Pleading, § 298, and cases cited in note C; also, 6 Enc. Pleading & Practice, 311. The court further says: "No suggestion is made, however, tending to show wherein the defendants are prejudiced by the absence of Oliver C. Dalrymple (an omitted party) as a party; nor are we able to discover from anything averred in the complaint that his absence or presence as a party can prejudice or affect the interests of the defendants. * * * Nothing appears tending to show that John C. Dalrymple (an omitted party) claims any title as against the plaintiff, or that any person, whether a party to this action or not, has ever claimed title, right, or lien through or by any act done or omitted by John C. Dalrymple."

* * * * * * * * * * *

The order appealed from is affirmed. All concur.

SECTION 7. MISJOINDER OF CAUSES OF ACTION.

KURTZ v. OGDEN CANYON SANITARIUM COMPANY.

Supreme Court of Utah. 1910.

37 Utah, 313.

FRICK, J.:

* * * * * * * * * * *

The objection that "several causes of action have been improperly united in one cause of action" cannot be sustained. In section 2962, Comp. Laws 1907, it is provided that a party may demur upon the ground "that several causes of action have been improperly united." This provision applies in case a pleader sets forth several causes of action in his complaint which cannot be properly joined in the same action. The demurrer in the case at bar is based upon the ground that several causes of action have been

commingled in one statement as one cause of action. This is not a ground of demurrer, but is a ground for a motion to require the plaintiff to separately state his causes of action as provided in the last subdivision of section 2961. Phillips' Code Pleading, § 201. True, a party may demur upon the ground of improper union although the causes of action are mingled in one statement, if the union is not permissible under the provisions of the code. In the case at bar while each of the two notes sued on constituted a cause of action, these two causes of action could properly have been united in one complaint. If the demurrer, therefore, had been based upon the statute, the court still would not have erred in overruling it, because the causes of action upon the two notes could properly be united in one complaint. Nor did the court err in overruling the demurrer upon the ground that the complaint did not state a cause of action.[1]

* * * * * * * * * * *

STRAUP, C. J., and MCCARTY, J., concur.

[1] *Accord:* Beckman v. Waters (1906), 3 Cal. App. 734; Peterson v. Pantheon Lumber Co. (1911), 62 Wash. 189; Ponca Mill Co. v. Mikesell (1898), 55 Neb. 98; Lane v. Dowd (1903), 172 Mo. 167 (holding, however, that a motion to *elect* is the proper remedy).

In some states misjoinder is not a ground for demurrer. Under those conditions a motion to require plaintiff to elect would seem to be the proper remedy. Lewis' Adm'r v. Taylor Coal Co. (1902), 112 Ky. 845.

When the misjoinder results from the fact that the causes of action do not all affect all the parties, "Those affected by all the causes of action, as well as those affected only by one or more, may properly demur on this ground." People v. Equitable Life Assur. Soc. (1908), 124 N. Y. App. Div. 714, 729. But see, *contra*, Boggess v. Boggess (1894), 127 Mo. 305, 324.

HOWE v. COATES.

Supreme Court of Minnesota. 1903.

90 Minnesota, 508.

START, C. J.: The complaint herein purports to allege two separate causes of action. The defendants demurred to the complaint upon the ground (a) that several causes of action are improperly united therein; (b) that, as to the first supposed cause of action, it does not allege facts suffi-

cient to constitute a cause of action; (c) that, as to the second supposed cause of action, it does not allege facts sufficient to constitute a cause of action. The trial court made its order overruling the demurrer as to the first and second grounds thereof, and sustained it as to the third ground. Thereupon the plaintiff appealed from so much of the order as sustained the demurrer to the second supposed cause of action, and the defendants appealed from that part which overruled the demurrer as to the first and second ground therefor. The only error here assigned by the defendants is that the court erred in holding that several causes of action were not improperly united in the complaint, and in overruling their demurrer on that ground. Or, in other words, they neither raise nor urge in this court any question as to the correctness of the order appealed from, so far as it holds that the first supposed cause of action alleges facts constituting a cause of action, and overrules their demurrer on that ground. It therefore follows that the order, in so far as it relates to the first alleged cause of action, must be affirmed.

The plaintiff assigns as error that the court erred in sustaining the demurrer to his second supposed cause of action. It is obvious that, if the second supposed cause of action does not allege facts constituting a cause of action, there is and can be no improper joinder of several causes of action in the complaint, because, if such be the case, there is only one cause of action stated in the complaint. Logically, then, the first question to be considered is whether the supposed second cause of action states facts sufficient to constitute a cause of action.

* * * * * * * * * * *

* * * There being but one cause of action stated in the complaint, there was no misjoinder of actions.

It follows that the order appealed from, and the whole thereof, is affirmed.

So ordered.[1]

[1] *Accord:* Flint v. Hubbard (1901), 16 Colo. App. 464; Bulger v. Coyne (1897), 20 N. Y. App. Div. 224; Mader v. Plano Mfg. Co. (1903), 17 S. D. 553.

And similarly, if a motion is made to separately state two causes of action intermingled in one count, the motion will only be granted when it affirmatively appears that the complaint contains two good causes of action: Cohen v. Clark (1911), 44 Mont. 151.

SECTION 8. JOINT DEMURRERS.

FREDERICK v. KOONS.

Appellate Court of Indiana. 1907.

40 Indiana Appellate, 421.

RABB, J.: This action was brought by the appellee as administrator of the estate of Sarah Frederick, deceased, against the appellant, who was her surviving husband, to recover money alleged to have belonged to the deceased, and to have been wrongfully converted by the appellant to his own use. The complaint was in two paragraphs. A demurrer thereto was overruled and exceptions reserved, and general denial filed. A jury trial was had, resulting in a verdict and judgment in favor of appellee. Appellant's motion for a new trial was overruled, and the action of the court in overruling the appellant's demurrer to the complaint and for a new trial are assigned as errors here.

The first paragraph of the complaint contains many redundant allegations; but it does aver that the appellant converted to his own use and benefit $1,600, the property of said estate, which he refused, on demand, to turn over to the appellee. These allegations are sufficient to enable the complaint to withstand a demurrer. The allegation that $1,600 was converted means $1,600 in lawful money, and the failure to aver the amount of damages the estate sustained by reason of the unlawful conversion of the dollars was not a fatal omission. No question arises as to the sufficiency of the second paragraph of the complaint. Appellant seems to think he demurred to it, but the demurrer which he claims to have addressed to the second paragraph of the complaint was addressed, not to the second paragraph, but to the complaint. The complaint comprises both the first and second paragraphs, and, if either were sufficient, the demurrer was properly overruled. It is true the second paragraph was filed, the record shows, after issue was formed on the first paragraph, but that fact makes no difference. After the second paragraph of the complaint was filed, the complaint was comprised of the first and second paragraphs, and of neither alone, and thereafter a demurrer to raise any question as to the suf-

ficiency of either paragraph, standing alone, should have been addressed to the proper paragraph, which it was claimed was not sufficient.

* * * * * * * * * * *

Judgment affirmed.[1]

[1] A demurrer to the entire pleading will be overruled if there is one good count or defense. Sykes v. Kruse (1911), 49 Colo. 560; Krieger v. Feeny (1910), 14 Cal. App. 538; Peterson v. Pantheon Lumber Co. (1911), 62 Wash. 189; Jenkins v. Commercial Nat. Bank (1911), 19 Idaho, 290; Williams v. Black (1910), 24 S. D. 501; Jensen v. Dorr (1911), 159 Cal. 742; Bonham Nat. Bank v. Grimes Pass Placer Min. Co. (1910), 18 Idaho, 629; Emmerson v. Botkin (1910), 26 Okla. 218.

And the same rule applies where two causes of action are mingled in one count. The demurrer should designate the particular cause of action deemed defective, and unless it does so it will be overruled if either cause of action is good. Donahue v. Stockton Gas & Electric Co. (1907), 6 Cal. App. 276.

CARVER v. CARVER.

Supreme Court of Indiana. 1884.

97 Indiana, 497.

ZOLLARS, J.: Action by appellee in relation to real estate; verdict in her favor, and over a motion for a new trial and other motions, judgment upon the verdict that she is the owner, and entitled to the possession, of the undivided one-third of the real estate, and for $125 against appellant William Carver for the detention thereof.

Many alleged errors are argued as causes for a reversal of the judgment. The first is, that the court below erred in overruling the demurrer to the complaint, which is in two paragraphs.

* * * There are twenty-four persons named as defendants, who are appellants here. In the first paragraph of the complaint, four of the appellants are specially named. As against these the pleader assumed to state a cause of action. As to those not so named there was no attempt to state a cause of action. In the second paragraph, fifteen of the defendants are specially named. As against these again, there was an attempt to state a cause of action, and again, as to those not named, there was not such attempt. The defendants thus specially named in the different para-

graphs are not the same, except William Carver, and, possibly, one of the Johnsons.

The averments of the paragraphs are such as to make it certain that neither states a cause of action against any of the defendants except those specially named therein. Had the demurrer been several as to the defendants, it should have been sustained to each paragraph, as to all of them not so specially named. If, on the other hand, the demurrer was joint as to the defendants, and the paragraphs state a cause of action against any one of them, it was properly overruled. *Teter v. Hinders,* 19 Ind. 93; *Eichbredt v. Angerman,* 80 Ind. 208; *Axtel v. Chase,* 83 Ind. 546; *Campbell v. Martin,* 87 Ind. 577; *Trisler v. Trisler,* 38 Ind. 282; *Bennett v. Preston,* 17 Ind. 291.

The demurrer filed in this case is as follows:

"The defendants separately and severally demur to the first and second paragraphs of the palintiff's complaint, and for cause of demurrer say that neither of said paragraphs states facts sufficient to constitute a cause of action against them."

This demurrer, we think, is separate as to each paragraph of the complaint, but clearly joint as to the parties. The words "separately and severally" cannot be applied both to the separate paragraphs and also to the defendants; we think they apply only to the separate paragraphs. Such would seem to have been the intent of the pleader. The *"defendants"* demur, and the conclusion of the demurrer is that a cause of action is not stated against *"them."* The demurrer is the same as if written, the defendants demur to the first and second paragraphs of the complaint, separately and severally, and for cause, state that neither of said paragraphs states facts sufficient to constitute a cause of action against them.

This brings us to a question of the sufficiency of the paragraphs of the complaint, as against any of the defendants.

As to the first, it is sufficient to say, in this connection, that whether or not it states a cause of action against all of the defendants, or all of those therein specially named, it at least makes a case against William Carver for the recovery of real estate. As to him it is in strict compliance with the requirements of section 1054, R. S. 1881, which is the same as section 595, code of 1852. The paragraph is,

therefore, sufficient to withstand the joint demurrer by all of the defendants.[1]

* * * * * * * * * *

[1] *Accord:* Holmes v. Seabord Portland Cement Co. (1909), 63 Misc. (N. Y.) 82; Rand v. Butte Electric Ry. Co. (1910), 40 Mont. 398; Smith v. Clark (1910), 37 Utah, 116; Beyer v. Bullock (1909), 56 Wash. 110; Boyd v. Mutual Fire Ass'n (1902), 116 Wis. 155; Belknap v. Whitmire (1903), 43 Ore. 75; Hirsheld v. Weill (1898), 121 Cal. 13; Palmer v. Bank of Zumbrota (1896), 65 Minn. 90; Miller v. Rapp (1893), 135 Ind. 614; Stahn v. Catawba Mills (1898), 53 S. C. 519; Evans v. Fall River County (1896), 9 S. D. 130.

In demurring severally to a pleading it is not necessary for each party demurring to file a separate paper, and a demurrer filed by several parties setting forth the names of all and stating that "each separately and severally demurs . . . . and for cause of demurrer says," is a separate and several demurrer on the part of each. Whitesell v. Strickler (1906), 167 Ind. 602.

CHAPTER VII.

THE REPLY.

SECTION 1. WHEN REQUIRED.

RAND v. BUTTE ELECTRIC RAILWAY COMPANY.

Supreme Court of Montana. 1910.

40 Montana, 398.

Mr. Chief Justice BRANTLY delivered the opinion of the court:

Action for damages for personal injuries alleged to have been suffered by plaintiff by an assault upon him by defendants Wharton McDonald, and Vivian, employes of defendants W. A. Clark and the Butte Electric Railway Company, hereinafter referred to as the company, while acting within the scope of their employment. The facts alleged in the complaint about which there is no dispute are the following: The company owns and operates a street railway in the city of Butte which extends about two miles from the city to a pleasure resort known as the "Columbia Gardens." It also owns, controls, and maintains this resort, its purpose in so doing being to secure profit from the attendance upon the resort by the public, to witness ball games, etc., had there, and from the increase in the number of its passengers to and fro from the city. * * * On November 16, 1907, there was a football game played at the Gardens. * * * The facts connected with the alleged assault are stated in the complaint as follows:

"(9) That for a long time prior to the 16th day of November, 1907, and especially on the said day, the defendant Butte Electric Railway Company and W. A. Clark employed the defendants McDonald and Vivian, for the purpose of assisting in handling the crowds and patrons who attended the said Columbia Gardens and the said football game. * * *

"(10) That on the said 16th day of November, 1907, this plaintiff became a passenger upon the cars of the defendant railway company. * * *

"(11) That while plaintiff was on and at the said platform, and on and at the said depot and a passenger as aforesaid, the defendants McDonald and Vivian, while discharging their duty and acting within the scope of their employment, without cause or provocation, or any excuse therefor, beat, bruised, maltreated, and severely injured this plaintiff, and that all of said acts were done in the presence of, and as plaintiff is informed and believes, with the knowledge, acquiescence, and consent of the defendant Wharton."

* * * * * * * * * * *

The defendant Wharton and the company filed a joint answer, * * * The denials of paragraph 9 are stated as follows: "As to paragraph 9, these defendants aver: That prior to the 16th day of November, 1907, the defendants Frank C. McDonald and Morton M. Vivian had been, and on said 16th day of November, 1907, were, regularly and duly appointed, qualified, and acting deputy sheriffs of Silver Bow county, state of Montana, and as such deputy sheriffs were peace officers, authorized by law to preserve peace and order, and to prevent violence and disorder and unseemly conduct and the commission of disorderly acts by individuals in the county of Silver Bow, state of Montana; and that for the purpose of preserving peace and order, and attending to the orderly conduct of people at said Columbia Gardens, said defendants Frank C. McDonald and Morton M. Vivian were, on the 16th day of November, 1907, present at said Columbia Gardens, and as such deputy sheriffs and peace officers were engaged in the fulfillment of their duties and functions as such at said time and place, and not otherwise were they present; nor were they engaged in any other capacity than as deputy sheriffs and peace officers, at said time and place, for the said purpose aforesaid; and these defendants deny each and every allegation of said paragraph 9 not herein expressly admitted as above set forth."

As a special defense, after alleging substantially the facts stated in the foregoing paragraph, the answer continues: * * * The plaintiff by reply denies generally the affirmative defense alleged.[1]

* * * * * * * * * * *

[1] The statute is as follows: Revised Codes, 1907:

"§ 6560. *What reply to contain.* Where the answer contains a counterclaim, or any new matter, the plaintiff, if he does not demur, shall within twenty days after service and filing of the answer, reply to such counter-

2. At the opening of the trial, after a witness had answered the usual preliminary questions, objection was made to the introduction of evidence in support of the allegations of the complaint, on the ground that, inasmuch as the denials in the replication respond only to the allegations of fact set forth in the affirmative defense, the facts stated in the answer in response to paragraph 9 of the complaint, stand admitted, and therefore constitute a complete defense to the action; for, counsel say, if McDonald and Vivian were acting within the scope of their duty, as charged in the complaint, and were present as peace officers and engaged in keeping the peace, as is alleged in this uncontroverted portion of the answer, they are not individually liable; nor are the other defendants liable, because it thus appears that they were not in the employ of the other defendants. In any event, counsel say, these admitted facts exclude any inference of liability on the part of the other defendants. There is no merit in this contention. Under the statute, the answer must consist of two parts, the first embodying the admissions and denials, and the second, new matter constituting a defense or counter-claim. Rev. Codes, § 6540. A reply is required only when the answer contains new matter which constitutes a defense or counter-claim, stated as such. Rev. Codes, § 6560. Instead of contenting themselves with the denial that McDonald and Vivian were employes of Clark and the company, the defendants undertake to allege facts showing that neither they nor the

claim or new matter, denying, generally or specifically, each allegation controverted by him, or of any knowledge or information thereof sufficient to form a belief, and he may allege, in ordinary or concise language, and without repetition, any new matter, not inconsistent with the complaint, constituting a defense to such counter-claim or new matter in the answer.

"§ 6562. *Failure to reply.* If the plaintiff fails to reply or demur to the counter-claim, the defendant shall be entitled to the same relief as a plaintiff upon the failure of defendant to demur or answer the complaint. If the answer contains new matter and the plaintiff fails to reply or demur thereto within the time allowed by law, the defendant may move, on notice, for such judgment as he may be entitled to upon such statement, and the court may thereupon render judgment or order a reference or assessment for damage by jury as the case may require."

The majority of the code states have adopted this policy in regard to replies, requiring them in all cases where new matter, either by way of defense or counter-claim, appears in the answer, in default of which such new matter is deemed admitted. The statutes are as follows: *Arizona*, Code Civ. Pro., § 148; *Colorado*, Code Civ. Pro., § 66; *Connecticut*, Gen. St., 1902, § 610; *Indiana*, Burns' Rev. St., 1908, § 363; *Kansas*, Code Civ. Pro., § 104; *Minnesota*, St., 1904, § 5241; *Missouri*, Ann. St., 1906, §§ 607, 628; *Nebraska*, Code Civ. Pro., § 109; *Ohio*, Gen. Code, 1910, § 11326; *Oklahoma*, Comp. Laws, 1909, § 5642; *Oregon*, Lord's Laws, § 77; *Washington*, Rem. & Ball, Ann. Codes, § 277; *Wyoming*, Comp. St., 1910, § 4399.

other defendants are liable, because they were present and acting in the discharge of their duties as public officers, and not otherwise. If it was a fact that McDonald and Vivian were not in the employment of the company, the company could not be held liable, no matter in what capacity they acted. Nor could Wharton be held liable unless he personally participated in the assault. Therefore, so far as they are concerned, the portion of the answer in question is an argument setting forth the reason why the defendants should not be held liable, and is, what is termed in the books, an argumentative denial of the portion of the complaint at which it was directed, and amounts to nothing more than a denial. Pomeroy's Code Remedies, § 515 et seq.; Bates' Pleading, Practice, Parties & Forms, p. 342; 1 Ency. Pleading & Practice, 799.[2] * * *

* * * * * * * * * *

Of the several other assignments urged by counsel, we find none of sufficient merit to demand special notice.

The judgment and order are affirmed.

Affirmed.

Mr. Justice SMITH and Mr. Justice HOLLOWAY concur.

[2] *Accord:* Smith v. Louisville & Nashville R. R. Co. (1893), 95 Ky. 11; Peaks v. Lord (1894), 42 Neb. 15.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY v. HIGGINS.

Supreme Court of Arkansas. 1884.

44 Arkansas, 293.

SMITH, J.: A minor, suing by his next friend, brought this action against the railway company for personal injuries sustained in its service. The answer traversed the allegation of carelessness in the operation of the defendant's road, and averred contributory negligence, denied the plaintiff's minority and pleaded that for the sum of $125 paid to him, he had in writing released all right of action against the company. The plaintiff replied that he was a minor when he executed the release and was therefore not

bound by it. Upon this issue the cause was tried and the jury gave a verdict for $4,000.

As the answer did not contain a set-off or counter-claim no reply was admissible. When the answer was filed. the cause was at issue; and the circuit judges should not permit the record to be incumbered with useless and improper pleadings.[1] * * *

* * * * * * * * * * *

[1] "The court did not err in striking out the reply of appellants. 'There can be no reply except upon the allegation of a counter-claim or set-off. . . . A reply improperly filed should be stricken out.'" Lusk v. Perkins (1886), 48 Ark. 238. The present statute is found at § 6109, Kirby's Digest, 1904.

In *Wisconsin*, also, a reply is authorized only to a counter-claim. St., 1898, §§ 2659, 2662.

STENSON v. ELFMANN.

Supreme Court of South Dakota. 1910.

26 South Dakota, 134.

CORSON, J.: This is an appeal by the plaintiffs from a judgment entered in favor of the defendants and from the order denying a new trial. The action was instituted by the plaintiffs to enforce the specific performance of a contract for the sale of a certain tract of land in Brown county. An answer was served and filed by the defendants denying each and every allegation alleged in the complaint, and setting up a number of defenses to the plaintiffs' action, but no counter-claim was interposed on their part. The plaintiffs filed a reply to the defendants' answer, setting up several matters that they claimed as constituting an estoppel, which reply, on motion of the defendants, was stricken out by the court. * * *

As before stated, the plaintiffs filed and served a reply setting up certain matters of estoppel on the part of the defendant Elizabeth Elfmann, and alleging that, by reason of said acts of estoppel, the said Elizabeth Elfmann was bound by the contract notwithstanding her failure to sign the same as a party thereto. The grounds of said motion, among other things, were that said reply is redundant,

immaterial, and surplusage, and that it does not contain a statement of new matter constituting a counterclaim. This motion, as before stated, was granted by the court, and the reply stricken from the record. We are of the opinion that the court committed no error in striking out the same, as no counter-claim was pleaded by the defendants. Section 130 of the Code of Civil Procedure provides that: "When the answer contains new matter constituting a counter-claim, the plaintiff may, within thirty days, reply to such new matter, denying generally or specifically each allegation controverted by him. * * * And in other cases, when an answer contains new matter constituting a defense by way of avoidance, the court may, in its discretion, on the defendant's motion, require a reply to such new matter; and in that case, the reply shall be subject to the same rules as reply to a counter-claim."[1] It will be observed that, by the provision of the section above quoted, no reply is permissible except to a counter-claim interposed by the defendant, unless the court, on motion of the defendant, requires a reply to be filed to any one or more of the defenses interposed by him. The contention of the appellants that the plaintiffs had a right to file a reply setting up matters of estoppel as against the defendant Elizabeth Elfmann, is therefore not tenable. The court, therefore, committed no error in granting defendant's motion.

* * * * * * * * * * *

[1] The following states have statutes practically identical with this: *New York*, Code Civ. Pro., §§ 514, 517; *North Carolina*, Revisal of 1905, § 485; *North Dakota*, Rev. Codes, 1905, § 6863; *South Carolina*, Code Civ. Pro., § 174; *South Dakota*, Code Civ. Pro., § 130.

TATE v. ROSE.

Supreme Court of Utah. 1909.

35 Utah, 229.

FRICK, J.: This is an action to quiet title to certain lands in Weber county, Utah. The respondent, in substance, alleged that one George S. Tate, on the ——— day of January, 1900, died intestate; that at the time of his death

said deceased was the owner and in possession of certain real estate, described as the west half of the southwest quarter of section 18, township 7, range 1 west, Salt Lake meridian, United States survey; that on the 30th day of March, 1907, the respondent was duly appointed administrator of the estate of said George S. Tate, deceased, and acting administrator of said estate; that the action is brought by him as administrator for the use and benefit of said estate; that the appellant claims an estate or interest in the lands described, but that the claim of said appellant is without right, and that he has no estate, right, title, or interest in said described lands, or any part thereof. These allegations were followed by the usual prayer in such actions. The defendant demurred generally to the complaint, and, upon the overruling of the demurrer, answered. He admitted the appointment of respondent as administrator of said estate, but with regard to the ownership of the land in question he answered as follows: That appellant "has no knowledge or information thereof (ownership) sufficient to form a belief." Appellant further averred that "he is the owner in fee simple of the real estate described, * * * and is in possession thereof," and that the action is barred by virtue of sections 2859 and 2860, Rev. St. 1898. Upon this answer appellant prayed that the title to the land be quieted in him. It will be observed that the ownership of the land is not denied by appellant, except by the inference to be deduced from his allegation that he is the owner. When the case was called for trial, the appellant moved for judgment on the pleadings, upon the ground that respondent had failed to reply to the new or affirmative matter contained in the answer. It is claimed by him that the affirmative allegations contained in the answer were admitted, and hence he was entitled to judgment. The court overruled the motion, which ruling is assigned as error.

It is contended by appellant that the averment of ownership, as well as the plea of the statute of limitations in the answer, constitute new matter which requires a reply. Section 2980, Comp. Laws 1907, as in force when this action was commenced, so far as material here, reads: "There shall be no reply except, (1) where a counter-claim is alleged; or, (2) where some matter is alleged in the answer to which the plaintiff claims to have a defense by reason of the existence of some fact which avoids the matter alleged in the

answer." Under our code, therefore, a reply is not required to new or affirmative matter set up in the answer under all circumstances, and, where a reply is not required, section 2996 provides that "an allegation of new matter in an answer to which a reply is not required * * * is to be deemed controverted by the adverse party." If the new matter set up by appellant, therefore, did not require a reply, then it was denied or controverted as a matter of law. Is a reply required, in view of the nature of the action and the issues presented by the pleadings?

The plea of the statute of limitations, in view of section 2980, *supra*, certainly did not require a reply. All that respondent could have done would have been to deny that the statute of limitations had any effect upon his cause of action, and this denial the statute made for him. In case the time required by the statute to bar an action has run against the plaintiff, and he desires to show that, notwithstanding such fact, the action, nevertheless, is not barred by reason of a new promise made by, or the non-residence of, the defendant, by reason of which he seeks to avoid the plea of the statute of limitations, then a reply setting forth these facts may be necessary. In this case there was no such issue, and hence no reply was required.

Are the averments of ownership and possession contained in appellant's answer in the nature of a counter-claim which requires a reply? Section 3511, Comp. Laws, 1907, provides: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." This action was commenced and is prosecuted under the provisions of that section. What is the purpose of such an action? There can ordinarily be but one, and that is to judicially determine who has the title to the land, and, when that is determined, to enter a judgment quieting the same in the person in whom it is vested as against the adverse claimant. In the very nature of things, therefore, the plaintiff must set forth in his complaint the fact that he is the owner of the land in question, and that the defendant claims some estate or interest in the land adverse to the rights of the plaintiff. A mere allegation of ownership and possession, or right of possession, would not constitute a complete cause of action against any one. It must further appear that some one disputes plaintiff's rights,

and who the person is that disputes them. Upon these allegations plaintiff usually prays (which was done in this case) that the adverse claimant be required to set forth his claims, and that such claims be adjudged to be without merit, and that the title be quieted in the plaintiff, and that defendant be enjoined from interfering with the property or the plaintiff's rights therein or thereto. The defendant is thus apprised of plaintiff's claim and that he asks the court to quiet the title to the property in him. The defendant may ignore the action and make default, or he may disclaim any right in the property and recover his costs, or he may set up his adverse claim to the property. Where, however, the defendant simply claims the title to be in him as owner without setting forth any other defense, it seems to us the issues are fully made up by the complaint and answer. The only question in such a case is, who has the title? The plaintiff claims it on the one hand, while the defendant claims it on the other. The real controversy, or matter litigated, in an ordinary action to quiet title, therefore, is the question of ownership. But in connection with this ownership the plaintiff must allege that some third party claims some interest adverse to him, and upon this the prayer is made that the adverse claimant be required to set forth his interest, so that the court may pass upon and adjudicate the respective claims of the parties. That the defendant claims some interest is thus made to appear in the complaint. If, in such a case, the defendant sets forth the nature of his adverse claim in his answer and avers ownership, is such an averment to be treated as new matter or as a counter-claim requiring a reply? We think not. In such instance the plaintiff claims ownership and asks that the title be quieted in him, notwithstanding the claims of the defendant. The defendant simply sets forth the nature of his claims. Would it not be folly to say that in a legal sense the plaintiff admits the rights claimed by the defendant in his answer when the plaintiff is required to and does allege that the defendant claims some estate or interest in the property, but that such claim is without right, and asks the court to declare it to be so? The plaintiff has already, in his complaint, negatived the defendant's claims of rights, whatever they may be, and he could do no more than this in a reply. The principal purpose of written pleadings is to frame and present the issues to be tried.

What is admitted presents no issue. In an action to quiet title, where the defendant merely pleads ownership generally to the property in question, without claiming title through a different or independent source, the issues, in our judgment, under our code, are fully made up by the complaint and answer without a reply. Where the defendant claims a lien against the property, with or without a prayer to foreclose the same, or where he sets up a specific title, or where he pleads facts which the plaintiff concedes but desires to avoid by reason of some new matter, then a reply may be required, but otherwise not. This assignment must, therefore, be overruled.

* * * * * * * * * * *

From what has been said it follows that the judgment ought to be, and it accordingly is, affirmed, with costs to respondent.[1]

STRAUP, C. J., and MCCARTY, J., concur.

[1] *Iowa* has this same statute: Code, 1897, § 3576.

STERLING v. SMITH.

Supreme Court of California. 1893.

97 California, 343.

MCFARLAND, J.: In her complaint the plaintiff averred that during a certain period defendant was her confidential agent in purchasing and selling real estate, and in transacting other business for her; that as such agent, and for such business, he received from her during said period the sum of $11,920 or thereabouts; that during said period he paid out and expended for her the sum of $6,225 or thereabouts, leaving a balance of $5,695, with interest, due her from him; and for this last sum she prays judgment. The defendant answered, admitting the agency as alleged in the complaint, but denied that he had received of plaintiff's money more than $9,920.70. The court found that defendant had received of plaintiff's money only the said amount of $9,920.70. But the defendant averred that, in addition

to the said sum of $6,225 paid out by him for plaintiff, as averred in the complaint, he also paid out for her the further sum of $3,600. He averred that this latter sum of $3,600 had been paid out by him for her in purchasing certain interests in what is called generally the "Kansas Street Syndicate," which afterwards became a corporation, and was engaged in the purchase and sales of land, principally at Pasadena, Cal. The facts as to this syndicate and the expenditure of money of plaintiff, by defendant in connection with the same, are stated in great detail in the answer. The court found against the defendant as to the said $3,600 alleged to have been expended with said syndicate, and refused to allow defendant for the same, and entered judgment for the plaintiff upon the basis of allowing defendant as against said sum of $9,920.70 only the sum of $6,503.75. Defendant appeals from the judgment, and the only point made by him for a reversal of the judgment is the refusal of the court to allow him for said amount paid out in said syndicate. The court found that prior to the time when defendant made the purchase of interests from said syndicate for plaintiff, "he had already become a member of said syndicate, and was one of the joint owners of the property of said syndicate, and of the interests so purchased by him for her; that he did not inform her, and she did not know, at the time she made said purchase, that he was a member of said syndicate, and a part owner of the interests he was about to purchase for her, but led her to believe he was not a member of said syndicate;" and that at the time defendant made said purchase for plaintiff the syndicate was indebted in a large amount, exceeding $55,500, which defendant had been instrumental in incurring, and that he did not notify her of said debt, but represented to her that she would not have any calls to pay if she became a member of the syndicate.

The main contention of appellant is that the findings above referred to are entirely outside of any issues made by the pleadings, for the reason that the complaint does not contain any allegation of facts constituting fraud of any character, or any allegation that appellant was a member of the syndicate, or that she did not know of his having an interest therein, etc., which allegations appellant contends were absolutely essential in order to admit evidence upon the subject. This position, however, is not tenable.

Our system of pleading does not include a replication, and under section 462, Code Civil Proc., "the statement of new matter in the answer in avoidance, or constituting a defense or counter-claim, must on the trial be deemed controverted by the opposite party." The averments in the answer as to the investments in the syndicate constituted new matter; and, if a replication were allowable, the plaintiff, by such a pleading, could have set up the facts found by the court as aforesaid. But under our system of pleading she is deemed to have set up such facts. No doubt, when a cause of action rests upon fraud, the facts constituting the fraud must be set up in the complaint; but such was not the case here, for the necessity of proving fraud appeared only after the answer of the defendant. And a plaintiff is in that position with respect to all new matters set up in the answer. *Williams v. Dennison,* 94 Cal. 540; *Association v. Clark,* 84 Cal. 204; *Colton L. & W. Co. v. Raynor,* 57 Cal. 588; *Curtiss v. Sprague,* 49 Cal. 301; *Canfield v. Tobias,* 21 Cal. 349. In *Colton L. & W. Co. v. Raynor, supra,* the court, in speaking of said section 462, say: "This has always been regarded as allowing a plaintiff, in reply to such new matter, to introduce on the trial any evidence which countervails or overcomes it, as if it were inserted in a replication, and pleaded with all the precision and fullness which the strictest rules of law ever required."[1]

* * * * * * * * * * *

Judgment affirmed.

DEHAVEN, J., and PATTERSON, J., concurred.

[1] In the following states, also, no provision is made for a reply in any case: *Idaho,* Rev. Codes, 1908, § 4162; *Nevada,* Comp. Laws, 1900, § 3145.

Rejoinder. In most code state no rejoinder is allowed. In *Indiana* it is authorized in case of a reply of new matter to a counter-claim: Burns' Rev. St., 1908, § 363. In *Connecticut* pleadings subsequent to the reply may be filed by leave of court: Gen. St., 1902, § 610. In *Kentucky* the pleadings proceed to a final issue, the code providing that "there shall be no reply, nor additional pleading, except to affirmative allegations of an adverse pleading:" Carroll's Code, § 112.

SECTION 2. DEPARTURE.

HILL BRICK AND TILE COMPANY v. GIBSON.

Supreme Court of Colorado. 1908.

43 Colorado, 104.

Mr. Justice CAMPBELL delivered the opinion of the court:

The complaint and answer are verified. The latter contains denials of some material allegations of the complaint and statements that defendant is a corporation, and that it owns and carries on a certain business, in conducting which it employed plaintiff, and that he worked for defendant as alleged in the complaint.

* * * Before the trial defendant * * * [moved] for judgment upon the pleadings, * * * because the replication was inconsistent with, and a departure from, the cause of action set up in the complaint. The court overruled this motion for judgment on the pleadings, and proceeded with the trial, which resulted in a judgment for the plaintiff. * * *

* * * The replication is inconsistent with the complaint; a defect which, under the common law practice, is called a departure. To establish his cause of action, plaintiff must prove the fact of defendant's incorporation, that it was engaged in conducting a certain business, and that he was employed by defendant and was working therein as was expressly charged in the complaint. The amended replication denied every allegation and statement contained in the answer, and this answer, among other things, contained statements that these essential allegations of the complaint were true. The replication, therefore, in legal effect, denied the very things which plaintiff was required to prove before he was entitled to recover, and it was, therefore, inconsistent with, and repugnant to, important statements in the cause of action set up in the complaint. 18 Enc. Pl. & Pr., pp. 700, 705, 720, 722, 723; *Lebanon M. Co. v. Consolidated Rep. M. Co.*, 6 Colo. 371; *Bruce v. Endicott*, 16 Colo. App. 506; *Moyle v. Bullene*, 7 Colo. App. 308; *Allenspach v. Wagner*, 9 Colo. 127.

* * * For the reasons given, the judgment is reversed and the cause remanded.

Reversed and remanded.

Chief Justice STEELE and MR. Justice GABBERT concur.

SPIESS' ADMINISTRATRIX v. BARTLEY.

Court of Appeals of Kentucky. 1908.

130 Kentucky, 277.

Opinion of the court by Judge CARROLL—Reversing:

Charles Spiess and Benjamin Bartley, having a controversy about the hire of a traction engine owned by Bartley and rented by Spiess, submitted the case in December, 1905, to Edward Bell and Ed. C. Dawson, arbitrators, and, in the event they could not agree, to William J. Dawson, umpire. The arbitrators and the umpire in December, 1905, made the following award in writing: "Said Spiess shall pay Bartley $1.75 per day from the 6th day of November, 1905, until the engine is returned to said Bartley at New Haven, Ky., this being a concession of $1.00 per day from the contract price. Said Spiess is to return said engine to New Haven, Ky., and replace main cog-wheel which is broken with a new one; said Spiess to have five days after engine is returned to New Haven in which to replace said wheel." In January, 1906, Bartley, ignoring the submission and award, brought suit against Spiess to recover from him rent for the engine at $2.75 per day, amounting to $195.25, and $35 damages for breakage. To this petition Spiess answered, denying the indebtedness, and in a separate paragraph pleading the award in bar of Bartley's right to maintain an action independent of the award. In February, 1907, the death of Spiess was suggested, and in October, 1907, the action was duly revived against the administratrix. On February 11, 1908, Bartley filed a reply, in which he admitted that the matters and things sued upon in his petition were submitted to arbitrators and an umpire, who in December, 1905, made their award, copies of which he filed with his reply. He averred

that the award covered all points in controversy, and settled all matters in dispute, and sought to recover on the award the sum of $217.51, the amount found to be due him under the award according to his method of calculation; and for this amount he asked judgment. On February 14, 1908, the following order was made: "This cause having been heretofore revived against Amelia Spiess, as administratrix of Charles Spiess, and being called for trial, the allegations of the reply, not being controverted, are taken for confessed, and it is adjudged that plaintiff recover of Amelia Spiess, as admnistratrix, the sum of $217.51, with 6 per cent. interest."

It will thus be seen that in the petition filed appellee sought to recover upon a contract, and that in a reply he abandoned the contract, and sought to and did recover upon the award. There was a departure from the original cause of action—in fact, a new and independent cause of action was set up in the reply. Both of the parties to the controversy might have ignored the award, but they did not do this. Spiess in his answer expressly relied upon it as a bar to a recovery upon the contract. As the submission covered all the matters in dispute between the parties, Bartley should in his original petition have sued on the award, but, failing in this, should have set it up in an amended petition. The controversies between the parties were merged in the award.

The plaintiff cannot in a reply depart from the cause of action stated in his petition, or obtain a judgment by default upon a cause of action set up for the first time in a reply. Under Civ. Code Prac. the cause of action upon which a plaintiff relies to obtain judgment must be set up in a petition, or an amended petition, section 90 providing that "the petition must state facts which constitute a cause of action in favor of the plaintiff against the defendant;" whilst under section 98 a reply may contain only "(1) a traverse, (2) a statement of facts which constitute an estoppel against or avoidance of a set-off and counter-claim, or defense stated in the answer, (3) a counter-claim against the set-off, and (4) a cross-petition." The established rules of pleading are not as generally observed as they should be by either the bench or bar, but it would be an unusual departure to permit a judgment by default to be rendered

upon a cause of action stated in a reply. *Spaulding v. Alexander,* 6 Bush, 160.

Wherefore the judgment is reversed, with directions to set aside the judgment and permit Bartley, if he desires to do so, to file an amended petition, and the parties may then tender other pleadings necessary to complete the issues.

JOHNSON v. STATE BANK OF SENECA.

Supreme Court of Kansas. 1898.

59 Kansas, 250.

DOSTER, C. J. This case comes to us upon a certificate of division of the judges of the court of appeals of the Northern department. The firm of Jordan Bros. recovered judgment against Mrs. S. C. Sherman, a merchant. Execution upon this judgment was issued to the plaintiff in error, P. C. Johnson, a constable. He levied it upon goods in possession of the defendant in error, which thereupon brought suit against him for damages for conversion, alleging itself to be the owner of the property. To its petition the plaintiff in error (defendant below) filed an answer justifying himself as constable, denying the plaintiff's ownership, and alleging that its only interest in the property was by virtue of a mortgage executed to it by Mrs. Sherman, which, as he alleged, had been fully satisfied by a sale of a sufficient amount of the mortgaged property to pay the debt, but that the residue of the property, including the portion levied upon, had been retained in the possession of the mortgagee under the fraudulent pretense that the mortgage debt remained unpaid.

To this answer the defendant in error (plaintiff below) filed a reply, admitting its possession of the property as mortgagee only, and alleging the making of an agreement by it with Mrs. Sherman to hold and sell the property, not only for the payment of the mortgage debt, but also for the payment of such orders as she might give upon it in favor of her creditors; that it had accepted and agreed to pay a large amount of such orders so drawn upon it; and that the

mortgage debt and the accepted orders exceeded in amount the total value of all the property covered by the mortgage. * * *

The district court erred in admitting the evidence of the plaintiff below under the pleadings in the case. The reply constituted what is called a "departure" in pleading. A departure is the statement of matter in a reply, replication, rejoinder, or subsequent pleading, as a cause of action or defense which is not pursuant to the previous pleading of the same party, and which does not support and verify it; and a test of departure in a reply is the question whether evidence of the facts alleged in it would be, if received, contradictory of the allegations of the petition. 6 Enc. Pl. & Prac. 460, 462; Bliss, Code Pl. § 369; *Baker v. Long,* 17 Kan. 341. The petition alleged ownership, positive and unqualified, in the plaintiff. The reply admitted the ownership to be that a mortgagee, which is ownership qualified and special. The allegations of these pleadings required for their support an entirely different character of evidence. The reply, therefore, was not pursuant to the petition, and did not support and verify it.

* * * * * * * * * * *

BROWN v. BAKER.

Supreme Court of Oregon. 1901.

39 Oregon, 66.

Mr. Justice MOORE delivered the opinion.

This is a suit to enjoin interference with the flow of water in the channel of a nonnavigable stream to the head of plaintiffs' irrigating ditches. * * *

* * * * * * * * * * *

The complaint asserts a right only to the use of a given quantity of water from Willow creek, acquired by prior appropriation, but by the reply the plaintiffs claim the right to the entire flow thereof through their premises by reason of their riparian proprietorship, whereupon the defendants moved to strike out the averment of new matter in the reply on the ground that it was redundant, imma-

terial, sham, frivolous, and irrelevant; but, the motion having been overruled, a demurrer was interposed to the entire reply on the ground that it did not state facts sufficient to constitute a defense, and to said averment of new matter therein for the reason that the same did not state facts sufficient to constitute a cause of suit, which was also overruled, and it is insisted that the court erred in these particulars. The first settler upon public land through which a stream of water flows may either divert the water, and use it for a beneficial purpose, or exercise the common-law right prevailing in the Pacific Coast states, where the modified rule of riparian ownership is still in force, and insist that the stream shall flow in its natural channel undiminished in quantity, except when applied to the natural use of the upper riparian proprietors, and for irrigation if the stream affords a sufficient quantity of water for the latter purpose. *Low v. Schaffer,* 24 Or. 239, 33 Pac. 678; *Milling Co. v. Coughanour,* 34 Or. 9, 64 Pac. 223.

The right of appropriation is incompatible with the doctrine of riparian proprietorship (Kin. Irr. § 272; Pom. Rip. Rights, § 132), and hence the allegation of new matter in the reply constitutes a departure from the averments of the complaint (6 Enc. Pl. & Prac. 462; *Mayes v. Stephens,* 38 Or. 512; 63 Pac. 760). A departure in a pleading in a suit in equity cannot be so prejudicial to a party as in an action at law; for in the former, the cause being tried by the court, it can segregate the testimony applicable to the allegations of the complaint, and reject the immaterial testimony in support of the inconsistent averments of the reply, which a jury cannot well do.

The departure being manifest, the question to be considered is whether the attention of the trial court was properly called to the defect. Sham, frivolous, and irrelevant replies may be stricken out on motion and upon such terms as the court, in its discretion, may impose. Hill's Ann. Laws Or. §§ 75, 79. It will be remembered that the motion assails only the new matter in the reply, while the statute contemplates an attack upon the entire reply for the reasons assigned.

The defendant may demur to any new matter contained in the reply, when it appears upon the face thereof that such matter is not a sufficient reply to the facts stated in

the answer. Id. § 79. The demurrer challenged the entire reply for the reason prescribed by the legislative assembly for assailing new matter therein only, and it contested the new matter for a reason not based upon the statute. Neither the motion nor the demurrer was sufficient to call to the court's attention the question of departure.

The objection to the reply upon that ground must be deemed waived upon the principle that, the motion and demurrer assailing the reply being mere technical objections, it was necessary specifically to state the reasons upon which they were predicated. *Bilyeu v. Smith,* 18 Or. 335, 22 Pac. 1073; *Hermann v. Hutcheson,* 33 Or. 239, 53 Pac. 489; *State v. Estes,* 34 Or. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25. A contrariety of judicial utterance prevails as to the proper practice of raising the question of departure, most courts holding that advantage thereof may be taken by a general demurrer, while others conclude that this may be accomplished by a motion to strike out. 6 Enc. Pl. & Prac. 468. But, however this may be, the decree complained of being predicated upon plaintiffs' alleged right to the use of the waters of Willow creek in consequence of a prior appropriation thereof, and not upon any claim as riparian proprietors to have the water flow in the channel of the stream undiminished in quantity, it is evident that the defendants were not prejudiced in any manner by the court's action in denying their motion or in overruling their demurrer.

* * * * * * * * * *

ST. PAUL FIRE AND MARINE INSURANCE COMPANY v. MOUNTAIN PARK STOCK FARM COMPANY.

Supreme Court of Oklahoma. 1909.

23 Oklahoma, 79.

TURNER, J.: This is a suit on an insurance policy. On May 8, 1905, the insurance company, plaintiff in error, issued to the insured company, defendant in error, a policy for

$400 insuring against loss or damage by hail a certain 100-acre field of growing wheat, the property of the latter, between the 4th of May and the 15th of September, 1905. The policy provided, among other things, for written notice to the insurance company of loss within 48 hours thereafter—which was duly given. It also provided that the insured shall within 60 days after loss make proof of same to the insurance company, and that a failure so to do within that time shall cause a forfeiture of any claim under such policy. This was never done, and one of the controlling questions in the case is whether Mr. Bates, the adjuster of the insurance company, waived formal proof of loss thus required.

* * * * * * * * * *

But it is insisted that there is a defect in the pleadings fatal to a recovery. The petition, after setting forth the policy and declaring on the contract of insurance, averred that the insured "had fully complied with all the terms and conditions of said policy on its part." For answer there was a general denial and an avermont that the insured had wholly failed to comply with that condition requiring proof of loss within 60 days. For reply the insured confessed the allegation and by way of avoidance set forth facts sufficient to constitute a waiver. Defendant, after moving for judgment on the pleadings, which was overruled, objected to the introduction of any evidence, under the pleadings, which was also overruled, evidence admitted, and exceptions duly saved. There was no error in this. That this was a departure there is no doubt, but neither method of assault called the court's attention to a departure in the reply, which could not be taken advantage of under our practice except by motion to strike, as the same is no ground for demurrer under our statute, 6 Enc. of Pl. & Pr. 468, lays down the general rule thus:

"In most of the United States departure may be taken advantage of by a general demurrer. In other states, however, it has been decided that advantage is to be taken of a departure in an opponent's pleading by a motion to strike out or by an objection to its filing; citing authorities." We have examined all the works available on code pleading, and in none of them find it laid down or intimated that this defect can be taken advantage of by objecting to the introduction of evidence under the pleadings.

The only case called to our attention where it is so held is *Johnson v. State Bank of Seneca,* 59 Kan. 250, 52 Pac. 860, which, while admitting the general rule to be as stated *supra,* cites no authority to support the rule laid down in that case, and we refuse to follow it.[1] Rather will we follow the practice as indicated in a later case decided by that court in *Surety Co. v. Bragg,* 63 Kan. 291, 65 Pac. 272, in which was recognized the rule as stated in 6 Enc. Pl. & Pr., *supra.* In that case the pleadings were in a state identical with those in the case at bar, except that the reply was assailed for a departure by both a demurrer and a motion to strike. The former the court refused to consider because not filed in time. The latter was heard and overruled, which was so far held to be the proper practice that the same was not questioned. On appeal, the Supreme Court held that in failing to strike the reply the trial court erred, and for that reason reversed and remanded the cause for a new trial. In *Magruder v. Admire,* 4 Mo. App. 133, the court held the reply to be a departure, and that the trial court erred in refusing to strike it out. In *Freeman v. Speegle,* 83 Ala. 191, 3 South. 620, it is held that the proper mode of raising the question of departure is a motion to reject or to strike from the files, and that the same could not be raised by demurrer, citing *Railroad v. Mallon,* 57 Ala. 168. See, also, *Morris v. Beebe et al.,* 54 Ala. 300: It is obvious that this is the better practice, as, in case the motion to strike is sustained, it calls attention sharply to the defect in the pleading and gives the plaintiff an opportunity to amend his petition before going to trial. It follows that, under the code, as to common law, by failing to properly take advantage of the defect of departure, the same was waived by defendant on going to trial on the pleadings as they were. See *Kannaugh v. Quarrett Min. Co.,* 16 Colo. 341, 27 Pac. 245, citing Bliss on Code Pl. § 396; Chitty Pl. (16th Ed.) p. 678; *Keay v. Goodwin,* 16 Mass. 1; *Andrus v. Waring,* 20 Johns. (N. Y.) 153; *New v. Wambach,* 42 Ind. 456. See, also, 6 En. Pl. & Pr. 470, which says:

"Objection to a departure must be taken before verdict, since it is a defect curable by a verdict. By taking issue upon a new case or defense which is material, all objection

[1] *Accord:* Union Casualty Co. v. Bragg (1901), 63 Kan. 291.

thereto on the ground of departure is waived, and cannot be raised after verdict."

We have examined the remaining assignments, but, finding no error, the judgment of the lower court is affirmed. All the justices concur.[2]

[2] In Smart v. Burquoin (1908), 51 Wash. 274, it was held that an objection to the introduction of any evidence on the part of the plaintiff was a proper mode of taking advantage of a departure.

SECTION 3. COUNTER-CLAIM IN REPLY.

BEAKEY v. VANDER MEERSCHEN.

Supreme Court of Kansas. 1908.

78 Kansas, 538.

The opinion of the court was delivered by

GRAVES, J.: This action was commenced in the district court of Pottawatomie county December 8, 1905, by Ed. Vander Meerschen against A. J. Beakey and others to recover judgment upon a promissory note and to foreclose a mortgage given to secure the same. The defendants filed an answer, consisting of a general denial unverified and a cross-petition founded upon an account for services rendered, and judgment was demanded thereon in the sum of $3,302.21. To this answer and cross-petition the plaintiff in his reply admitted the employment of the defendant, and set up a counter-claim for money received by him during such employment which had not been accounted for, and prayed judgment for the balance due, amounting to the sum of $5,281.14.

When the case was called for trial, the defendant made application for a continuance, which was denied. Thereupon he dismissed his cross-petition. The plaintiff then demanded a trial upon the counter-claim in his reply, which the court allowed, and the trial proceeded. The defendant's application for a continuance was based upon his inability to be present on account of neuralgia in the face, and he did not appear. The plaintiff recovered judgment on the note and a decree of foreclosure by default, and,

upon the trial, recovered $3,845.27 on his counter-claim. The defendant insists that the judgment entered upon the counter-claim is erroneous. We concur in this claim. The statute, which prescribes what a reply may contain, expressly limits the statement of new matter, to that which constitutes a defense to the answer. The section (section 4536, Gen. St. 1901) reads:

"When the answer contains new matter the plaintiff may reply to such new matter denying generally or specifically each allegation controverted by him; and he may allege in ordinary and concise language and without repetition any new matter not inconsistent with the petition, constituting a defense to such new matter in the answer."

The statute prescribing the contents of an answer, being section 94 of the code (Gen. St. 1901, § 4528), has no such limitation, but expresly permits the statement of any defense, counter-claim, set-off, or right to relief. It is obvious that the right to set up new causes of action or defense must end at some point, or pleadings and issues might become interminable and confusing. The statute having placed this point at the reply, parties may insist upon a compliance therewith.

The cause of action contained in the petition, being one to recover judgment upon a promissory note and to foreclose a mortgage, and the cause of action in the reply, being one for money had and received, are wholly disconnected and foreign to each other, and the prosecution of them in the same action in this manner is, to say the least, unusual in code pleading. If they might have been properly united in the petition, this would be immaterial, as the contents of a petition is regulated by a statute entirely different from that which prescribes the contents of the reply. In this case the defendant was unprepared for trial upon the set-off contained in his answer, and, failing to obtain a continuance, was compelled to dismiss this part of his answer. He was then forced to meet the counter-claim of the plaintiff which involved practically the merits of the set-off which had been dismissed. Under the statute quoted such a condition is avoided by confining the plaintiff in his reply to new matter which constituted a defense to the answer; and a dismissal of the answer carries with it the new matter in the reply.

The rule that a cross-petition should be regarded, so

far as the parties are concerned, the same as if the cross-petitioner were a plaintiff and the plaintiff a defendant thereto, to the extent that a dismissal of the petition does not affect the cross-petition, but leaves the issues made by it and the reply thereto to be litigated the same as between a petition and answer, does not apply here, for the reason that the statute authorizes the rule in the former case, and impliedly prohibits it in the latter.

In 19 Encyclopædia of Pleading and Practice, 794, it is said:

"In some jurisdictions it is held that the plaintiff may set up in reply a counter-claim or set-off against the defendant's claim. But such set-off or counter-claim can be used only to defeat a recovery by the defendant, and cannot be made the subject of a substantive claim upon which a judgment for the excess over the defendant's demand can be based. The more generally accepted doctrine is that a reply to a set-off or counter-claim is restricted to the averment of new matter constituting a defense which is not inconsistent with the complaint or declaration, and therefore a set-off or counter-claim cannot be set up against the defendant's claim."

Because of the error noted, the judgment of the district court will be modified. The judgment upon the cause of action stated in the petition is affirmed. The judgment entered upon the cause of action stated in the reply is reversed and vacated. The costs are equally divided between the parties.[1]

[1] A counter-claim in the reply is sometimes authorized by statute. *Kentucky*, Code Civ. Pro., § 98.

SECTION 4. WAIVER OF REPLY.

MERCHANTS' NATIONAL BANK OF GRAND FORKS v. BARLOW.

Supreme Court of Minnesota. 1900.

79 Minnesota, 234.

START, C. J.: This action originated in the municipal court of East Grand Forks. The complaint alleged that

on December 11, 1897, John and Angeline Rea, the then owners of certain wheat, duly executed to the plaintiff a chattel mortgage thereon, with other property, to secure the payment of $3,052.92, which was duly filed December 17, 1897; that thereafter, and on December 29, 1897, the defendant, as constable, at the direction of H. B. Laughlin, and by virtue of a pretended writ of attachment, seized and levied upon the wheat; that the plaintiff duly demanded the return thereof, whereupon the defendants Laughlin, Larson, and Rosaaen executed to the defendant Barlow an indemnity bond, as provided by statute, who refused to deliver the wheat, but converted it to his own use. The answer contained a general denial, and alleged as a justification for seizing the wheat a levy thereon by virtue of an execution issued on a judgment against John Rea in favor of Laughlin upon a demand antedating the plaintiff's mortgage in an action commenced after the mortgage was filed

* * * * * * * * * * *

There was no reply. On the trial the plaintiff introduced its chattel mortgage, with other evidence, tending to establish prima facie its cause of action. This evidence was objected to by the defendant on the sole ground that it was incompetent, irrelevant, and immaterial. The objection was overruled, and the evidence received, to which ruling the defendant excepted. * * *

* * * The defendants claim that by failing to reply the plaintiff admitted the new matter alleged in the answer; hence they were entitled to judgment on the pleadings. The plaintiff, on the other hand, claims that no reply was necessary, for the reason that the allegations of the answer did not constitute new matter, but were mere conclusions of law, which were not admitted by a failure to reply; and, further, that, if a reply were necessary, the cause was tried as if the allegations of the answer were in issue, and the want of a reply cannot be raised for the first time in the appellate court. The record does not show that any motion for judgment for the defendants for want of a reply was made in the trial court, or any objection made to the admission of evidence on the specific ground that the allegations of the answer were admitted by a failure to reply. It is substantially admitted that the question was raised for the first time in the Appellate

Court, unless the defendants' objections that the evidence was incompetent, irrelevant, and immaterial were sufficient to raise the question. We hold that they were not. Objections to evidence offered must be so specific that the court may intelligently rule upon them, and the opposite party may, if the case admits of it, remove them by amendment or otherwise; hence a general objection that the evidence is incompetent, irrelevant, and immaterial is not specific enough, where the real objection relates to the sufficiency of the pleadings. *Vaughn v. McCarthy,* 63 Minn. 221, 65 N. W. 249; *Johnson v. Okerstrom,* 70 Minn. 303, 73 N. W. 147. The mortgage and other evidence in this case were competent, material, and relevant to prove the allegations of the complaint which were in issue under the general denial in the answer. No objection on the ground of failure to reply having been made in the trial court, and the case tried as if the allegations of the answer were in issue, the objection cannot be raised for the first time in the Appellate Court, and the defendants must be held to have waived a reply, if one was necessary.[1]

* * * * * * * * * *

[1] *Accord:* Missouri Pac. Ry. Co. v. Palmer (1898), 55 Neb. 559; North St. Louis Bldg. Ass'n v. Obert (1902), 169 Mo. 507; Ferguson v. Davidson (1899), 147 Mo. 664; Killman v. Gregory (1895), 91 Wis. 478.

In Minard v. McBee (1896), 29 Ore. 225, the court said: "If the point had been made below, the plaintiff, by leave, could have corrected the error by filing the necessary reply, but he is taken at a disadvantage when reminded of his oversight here for the first time."

CHAPTER VIII.

MOTIONS.[1]

SECTION 1. IN GENERAL.

WALLACE v. LEWIS.

Supreme Court of Montana. 1890.

9 Montana, 399.

DE WITT, J.: * * * Our statute, section 482, Code Civil Proc., defines a motion as follows: "Every direction of a court or judge made or entered in writing, and

[1] THE CODE PROVISIONS ON THIS SUBJECT IN THE VARIOUS STATES ARE AS FOLLOWS:

Alaska. Carter's Ann. Codes, 1900, Code Civ. Pro.

"§ 66. Sham, frivolous, and irrelevant answers and defenses may be stricken out on motion, and upon such terms as the court may in its discretion impose.

"§ 76. If irrelevant or redundant matter be inserted in the pleading, it may be stricken out on motion of the adverse party; and when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment."

Arizona. Rev. St., 1901.

"§ 1355. Sham, irrelevant or frivolous answers and frivolous demurrers may be stricken out, or judgment rendered notwithstanding the same, on motion as for want of any answer.

"§ 1356. If irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion, and when a pleading is double, and does not conform to the statute, or when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may strike it out on motion or require it to be amended."

Arkansas. Kirby's Digest, 1904.

"§ 6131. If irrelevant or redundant matter is inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby, at the cost of the party whose pleading contained it.

"§ 6147. When the allegations of a pleading are so indefinite or uncertain that the precise nature of the claim or defense is not apparent, the court may require the pleading to be made definite and certain by amendment."

California. Kerr's Codes, 1908, Code Civ. Pro.

"§ 453. Sham and irrelevant answers, and irrelevant and redundant matter inserted in a pleading, may be stricken out, upon such terms as the court may, in its discretion, impose."

Colorado. Rev. St., 1908, Code Civ. Pro.

"§ 66. . . . Sham and irrelevant answers and defenses, and so much

not included in a judgment, is denominated an order. An application for an order is a motion." The statute of California is identical. Prac. Act Cal. § 515, and Code Civil Proc. Cal. § 1003. See, also, *Jenkins v. Frink*, 27 Val. 339. In *People v. Ah Sam*, 41 Cal. 650, TEMPLE, J., interprets the above law as follows: "A motion is properly an application for a rule or order, made *viva voce* to a court or judge. It is distinguished from the more formal applications for relief by petition or complaint.

of any pleading as may be irrelevant, redundant, immaterial or insufficient may be stricken out, on motion, and on such terms as the court in its discretion may impose. When any pleading is too general in its terms to be readily understood, the court may, on motion, require the same to be made more specific and certain, or may require a bill of particulars to be filed therewith. . . ."

Connecticut. Gen. St., 1902.

"§ 616. Unnecessary repetition, prolixity, scandal, impertinence, obscurity, or uncertainty in any pleading shall be ground for a motion to expunge or otherwise correct such pleading. Such motions shall be in writing, and shall specify the particular exceptions."

Idaho. Rev. Codes, 1908.

§ 4208. Same as the California statute, *supra*.

Indiana. Burns' Ann. st., 1908.

"§ 385. . . . But when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment.

"§ 391. An answer or other pleading shall be rejected as sham, either when . . .; and all surplusage, tautology, and irrelevant matter shall be set aside and struck out of any pleading, when pointed out by the party aggrieved."

Iowa. Code, 1897.

"§ 3618. Sham and irrelevant answers and defenses, and irrelevant and redundant matter in all pleadings, may be stricken out on motion, upon such terms as the court may, in its discretion, impose.

"§ 3630. When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may, on motion, require it to be made more definite and certain. . . . Such motion shall point out wherein the pleading is not sufficiently specific, or it shall be disregarded, and if the reason for such demand exists outside of the pleadings, the motion must state the same, and be supported by affidavit."

Kansas. Gen. St., 1909.

"§ 5715. . . . If redundant or irrelevant matter be inserted in any pleading it may be stricken out on motion of the party prejudiced thereby, and when the allegations of a pleading are so indefinite and uncertain that the nature of the charge or defense is not apparent, the court or judge may require them to be made definite and certain by amendment. If a pleading contains several causes of action, or different defenses, the court or judge may, in his discretion, require them to be separately stated and numbered."

Kentucky. Carroll's Codes, 1895.

"§ 113. . . . 8. Sham pleadings shall, upon or without motion, be stricken out by the court, at the cost of the parties for whom they are filed and of their attorneys.

"§ 121. Irrelevant or redundant matter in a pleading shall be stricken

The grounds of the motion are often required to be stated in writing, and filed. In practice, the form of the application itself is often reduced to writing, and filed. But making out and filing the application itself is not to make the motion. If nothing more were done, it would not be error in the court to entirely ignore the proceeding. The attention of the court must be called to it. The court must be moved to grant the order." We adopt these

out, upon or without motion, at the cost of the party whose pleading contains it."

Minnesota. Laws, 1905.

"§ 4136. Sham, irrelevant or frivolous answers, defenses or replies, and frivolous demurrers, may on motion be stricken out, or judgment rendered notwithstanding the same, as for want of answer or reply."

§ 4144. Same as § 1356 of the Arizona statute, *supra.*

Missouri. Ann. St., 1906.

"§ 612. If irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of the adverse party; and when the allegations or denials of a pleading are so indefinite or uncertain that the precise nature of the charge or denial is not apparent, and when they fail in any other respect to conform to the requirements of the law, the court may require the pleading to be made definite and certain, and otherwise conform to the law, by amendment.

"§ 640. All motions shall be accompanied by a written specification of the reasons upon which they are founded; and no reason not so specified shall be urged in support of the motion."

Montana. Revised Codes, 1907.

"§ 6567. If a demurrer, answer or reply is frivolous, the party prejudiced thereby . . . may apply to the court or to a judge of the court . . . for judgment thereupon. . . .

"§ 6568. Sham and irrelevant answers and replies, and irrelevant and redundant matter inserted in a pleading, may be stricken out, upon such terms as the court may, in its discretion, impose."

Nebraska. Comp. St., 1911.

"§ 6696. If redundant, scandalous or irrelevant matter be inserted in any pleading it may be stricken out on motion of the party prejudiced thereby. And when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment."

Nevada. Comp. Laws, 1900.

"§ 3152. If irrelevant or redundant matter be inserted in a pleading it may be stricken out by the court, on motion of any person aggrieved thereby."

New Mexico. Comp. Laws, 1897, Code Civ. Pro.

"Art. V, Sub-sec. 50. A frivolous demurrer, answer or reply may be stricken out on motion of the adverse party."

Art. V, Sub-sec. 51. Same as § 612 of the Missouri statute, *supra.*

New York. Chase's Code, Civ. Pro., 1910.

"§ 537. If a demurrer, answer or reply is frivolous, the party prejudiced thereby . . . may apply to the court or to a judge of the court for judgment thereupon. . . .

"§ 538. A sham answer or a sham defense may be stricken out by the court, upon motion, and upon such terms as the court deems just.

"§ 545. Irrelevant, redundant or scandalous matter, contained in a

views with the modification that we do not consider that the learned judge used the words "*viva voce*" in their exact literal signification. The application might be submitted to the court without argument or comment; but the attention of the court must be called to it in some way, by some movement of counsel. As the opinion cited says, "the grounds of the motion are often required to be stated

pleading, may be stricken out, upon the motion of a person aggrieved thereby. . . .

"§ 546. Where one or more denials or allegations, contained in a pleading, or so indefinite or uncertain that the precise meaning or application thereof is not apparent, the court may require the pleading to be made definite and certain by amendment."

North Carolina. Revisal of 1905.

"§ 472. Sham and irrelevant answers and defenses may be stricken out on motion, and upon such terms as the court may in its discretion impose.

"§ 496. If irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted. And when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment."

North Dakota. Rev. Codes, 1905.

§ 6862. Same as § 472 of the North Carolina statute, *supra.*

§ 6870. Same as § 496 of the North Carolina statute, *supra,* omitting the provisions as to when the motion must be made.

Ohio. Gen. Code, 1910.

"§ 11335. If redundant, irrelevant or scurrilous matter be inserted in a pleading, it may be stricken out on motion of the party prejudiced thereby. Obscene words may be stricken from a pleading on the motion of a party or by the court of its own motion.

"§ 11336. When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment."

Oklahoma. Comp. Laws, 1909.

§ 5659. Almost identical with the Kansas statute, *supra,* omitting the last sentence.

Oregon. Lord's Laws, 1910, Code Civ. Pro.

§§ 76, 86. Same as §§ 66, 76 of the Alaska statutes, *supra.*

South Carolina. Code of Laws, 1902.

§ 173. Same as § 472 of the North Carolina statutes, *supra.*

§ 181. Same as § 496 of the North Carolina statutes, *supra,* omitting the provision as to when the motion must be made.

South Dakota. Rev. Codes, 1903.

§ 129. Same as § 472 of the North Carolina statutes, *supra.*

§ 137. Same as § 496 of the North Carolina statutes, *supra,* omitting the provision as to when the motion must be made.

Utah. Comp. Laws, 1907.

§ 2987. Same as § 6568 of the Montana statutes, *supra.*

Washington. Rem. & Bal. Codes, 1910.

§ 275. Same as § 66 of the Alaska statutes, *supra.*

"§ 286. If irrelevant or redundant matter be inserted in a pleading, it

in writing, and filed." Without express direction, such is infinitely the better practice. The motion is thus preserved in the exact form which counsel desire to give it. It is then exempt from the dangers incident to journal entries and minutes, or even the transcription by stenographers and court clerks. But the motion itself is the application to the court. "The court must be moved to grant the order;" and, when so moved, the proceeding is a motion. * * * The moving party may not file his motion in writing, and wait for months before moving the court. Such practice would open the gate to abuses incalculable.[1]

* * * * * * * * * * *

BLAKE, C. J., and HARWOOD, J., concur.

may be stricken out on motion of any person aggrieved thereby; and when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment, or may dismiss the same."

Wisconsin. St., 1898.

"§ 2681. If a demurrer, answer or reply be frivolous the court or the presiding judge thereof may, upon motion . . . strike such pleading out and thereupon either order judgment in favor of the adverse party or, in his discretion, allow the party interposing the same to plead over, within a limited time on such terms as may be just. . . .

"§ 2683. If any pleading contain irrelevant, redundant or scandalous matter it may be stricken out, with costs, on motion of the adverse party, and the court or presiding judge, in discretion, may order the attorney who signed the same to pay the costs. When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent the court or presiding judge may require the pleading to be made definite and certain by amendment."

Wyoming. Comp. St., 1910.

§§ 4407, 4408. Same as §§ 11335, 11336 of the Ohio statutes, *supra.*

Several codes, which require pleadings to be verified, have the further provision that unverified pleadings may be stricken out on motion.

---

[1] *Motion must stand or fall as made.* In Hudelson v. First Nat. Bank (1898), 56 Neb. 247, the court said: "The court may, of course, in a proper case, grant a motion in part and deny it in part, but it is well settled by our decisions that to refuse to do so is not error." To the same effect see Valley Lumber Co. v. McGilvery (1908), 16 Idaho 338, 363.

SECTION 2. MOTION TO STRIKE.

TITTLE v. KENNEDY.

Supreme Court of South Carolina. 1904.

71 South Carolina, 1.

March 6, 1905. The opinion of the court was delivered by

Mr. Justice WOODS: The plaintiff in this action of claim and delivery recovered the following verdict: "We find for the plaintiff the oats described in the complaint, or their value, which we fix at one hundred and nineteen dollars and forty cents, and also actual and punitive damages fifty dollars. [Signed] Francis Henry, Foreman."

* * * * * * * * * * *

* * * The circuit judge was in error in charging that punitive damages are recoverable in an action of claim and delivery.

The complaint contained allegations appropriate to an action for punitive damages, and the defendants, in pursuance of notice, moved to require the plaintiff "to allege and state separately the several causes of action united in said complaint, to wit, a cause of action in claim and delivery of personal property and damages for the alleged unlawful taking and detention of the same, and (2) a cause of action for punitive damages," and then to require the plaintiff to elect upon which cause of action she would proceed. Failing in this motion, they moved to strike out from the complaint the words "with force and arms, unlawfully, violently, and in a high-handed manner," these words being the basis of the claim for punitive damages. This motion was also refused. It is not necessary to consider the motion made to require what the defendant insists were two causes of action to be stated separately, because it follows from the conclusion that punitive damages are not recoverable in an action of this character that the allegations relating thereto should have been stricken out. The case is clearly distinguished on this question of practice from *Berry v. Moore,* 69 S. C. 317, 48 S. E. 249. There the claim for punitive damages was stated as a separate

and distinct cause of action, and demurrer to that cause of action was held to be the proper remedy; here the allegations as to punitive damages are stated not as a separate cause of action, but along with the ordinary allegations in claim and delivery. "A demurrer is not generally a proper remedy for disposing of irrelevant or redundant matter contained in a pleading, but an application to strike out is the only proper remedy, since a demurrer does not lie to a part only of the allegations intended to set forth a single cause of action or defense; nor is irrelevancy, redundancy, or surplusage a ground of demurrer to the pleading as a whole. On the other hand, where an entire pleading, or part of a pleading, purporting to set up a separate cause of action or defense, is wholly devoid of merit, and consists only of irrelevant or superfluous matter, a general demurrer will lie, or the objection may be taken in some other manner proper for determining its sufficiency; but according to many authorities it may not be stricken out under a code provision, the language of which limits motions to strike out to irrelevant or redundant matter contained or inserted in a pleading which is otherwise good." 21 Ency. P. & P. 234-236. The motion to strike out should have been granted.

* * * * * * * * * * *

EWING v. VERNON COUNTY.

Supreme Court of Missouri. 1908.

216 Missouri, 681.

LAMM, P. J. * * *

* * * * * * * * * * *

3. Defendant assigns for error the overruling of its motion to strike out the petition. * * * Learned counsel for defendant, not only seeking to widen the statutory rules differentiating motions from demurrers, also hew out a novel path of doubtful use verging from the main-traveled road of general practice. The ground of the motion is that "said petition does not state facts sufficient to constitute a cause of action." Thus they seize the general statutory

ground of demurrer and harness it up for service in a motion to strike out. Now, motions and demurrers seek different remedies. A motion seeks some order of court falling short of the dignity of a judgment; a demurrer raises an issue at law, and seeks a trial and judgment on that issue. Bliss on Code Pleading (3d Ed.) §§ 418, 240, et seq.

A motion to strike out might be leveled at a frivolous pleading, or a second petition that was a departure from the first, or a sham pleading. So, it might be leveled at trifling, trivial, nugatory, redundant, or irrelevant matter, or matter of duplicity or unnecessary repetition, or the like; but it ought not to fill the well-defined and technical office of a demurrer in bringing to the attention of the court demurrable defects in a petition. Rev. St. 1899, §§ 598, 608, 611-613 (Ann. St. 1906, pp. 624, 643-645); Bliss on Code Pleading, *supra*.

The point is ruled against the defendant.[1]

* * * * * * * * * * *

[1] In Southern Home Ins. Co. v. Putnal (1909), 57 Fla. 199, it was said to be apparent "that while there is a difference in the functions performed by a motion to strike out a pleading and a demurrer thereto, and that they cannot be used interchangeably or indiscriminately, the line of demarcation between the two has not always been kept clear but at times has been wavy and shadowy. . . . It may be that it is not always an easy matter to differentiate the two methods. Some pleadings may be infected with such vices as to be open to attack either by a motion to strike out or by demurrer." If the courts can lay down no clear rules in the matter it would seem useless to expect the bar to do better, and a liberal policy in treating motions as demurrers, and *vice versa*, in proper cases, ought to prevail.

BLEMEL v. SHATTUCK.

Supreme Court of Indiana. 1892.

133 Indiana, 498.

MCCABE, J.: This was a proceeding by way of petition in Circuit Court under provisions of the drainage act approved April 6, 1885. Elliott, Supp. § 1184. The petition was referred to the drainage commissioners. * * * They afterwards reported. * * *

After an unsuccessful motion by appellants to set aside this report, the same was approved by the court below, and

the petition was dismissed, pursuant to section 3 of that act. Elliott, Supp. § 1886.

* * * * * * * * * * *

The first error assigned is "sustaining the motion of defendants to strike out the complaint of plaintiffs to set aside the report of commissioners." The paper here referred to as a complaint was a motion to set aside the report of the commissioners, though it is designated elsewhere in the record as both a motion and a complaint. It has been often held by this court that the character of a pleading is not determined by the name or designation applied to it by the pleader, but is to be determined by the contents of the same. *Searle v. Whipperman,* 79 Ind. 424; *Johnson v. Hosford,* 110 Ind. 572, 10 N. E. Rep. 407.

The pleading in question purports, in the body thereof, to be a motion to set aside the report of the drainage commissioners, and to refer the petition to new commissioners, for the reasons therein stated. It was therefore nothing but a motion. Indeed, the drainage act under which the proceeding was instituted does not contemplate the filing of a complaint to set aside a report of the commissioners. Then the motion of the appellees to strike out appellants' motion to set aside the commissioners' report was a superfluous motion, as was said by this court in *White v. D. S. Morgan & Co.,* 119 Ind. 340, 21 N. E. Rep. 968,—that "a motion to strike out another motion, to strike out and to reject a demurrer, are usually frivolous, and ought not to be entertained, or entered of record, by the trial court."

And so we hold that such motion ought not to have been entertained. Indeed, the court ought not to have allowed the same to be filed, and, after it was filed, ought, of its own motion, to have stricken it out as a needless incumbrance of the record, because the same relief demanded and same question raised by it would be afforded and raised by a proper ruling on the other motion.

But the trial court did entertain such a motion, and actually sustained it, and the question we have to determine under this assignment of error is, was it error to sustain such motion? The answer to that question depends to some extent upon what effect the sustaining of such second motion had upon the first motion. It cannot be justly said that it had no effect. The court below has treated it as if it had some effect upon the first motion, namely, to strike

it from the files. For all practicable purposes, it had the same effect as overruling the first motion would have had.

Upon reason it would seem that, if the court sustained a motion to strike out a motion, such act indicates that the court was of opinion that the first motion was not well taken, and therefore ought not to be sustained. It would seem to follow that the trial court, by entertaining the second motion to strike out the first, indicated a purpose and intention to hold that the first motion was not well taken, and ought to be overruled. This precise point was adjudged by the Supreme Court of California in *Lang v. Superior Court,* 71 Cal. 491. It is there held that sustaining a motion to strike out another motion is equivalent to overruling the first motion. We think that decision is a correct declaration of the law, and therefore we adjudge that the sustaining of the motion to strike out the motion to set aside report has the effect to overrule the latter motion. And though the error assigned is the sustaining the motion to strike out the other motion, we will treat it as if the error assigned was overruling the motion to set aside the report, for such is the effect of the action of the lower court assigned for error. It follows from this that the question presented by this assignment is, was it error to overrule the motion to set aside the report of the commissioners?[1]

* * * * * * * * * * *

[1] But where a motion to strike another motion is *overruled,* it cannot be held that the merits of the first motion have been passed upon. German Savings Bank v. Cady (1901), 114 Iowa 228.

Equally irrational is a demurrer to a motion, which was held, in Bonfoy v. Goar (1894), 140 Ind. 292, to be "wholly without warrant in our system of jurisprudence."

SWANK v. ELWERT.

Supreme Court of Oregon. 1910.

55 Oregon, 487.

Mr. Justice SLATER delivered the opinion of the court.

Mr. Justice KING, dissenting.

1. The motion to strike out was upon the grounds that the parts of the answer to which it was directed were sham,

frivolous, and irrelevant. It is claimed by defendants' counsel that this motion is not available to plaintiff, because it did not assail the entire answer, but only specified portions thereof, and in support of his contention he cites section 76, B. & C. Comp., providing that: "Sham, frivolous, and irrelevant answers and defenses may be stricken out on motion, and upon such terms as the court may in its discretion impose." He also relies upon the case of *Brown v. Baker,* 39 Or. 66, 71, 65 Pac. 799, 66 Pac. 193, interpreting a similar statute, applicable to the reply. There the motion was directed to the new matter of the reply, which presented an apparent departure from the averments of the complaint, and was based on section 79, Hill's Ann. Laws 1892, which is now section 80, B. & C. Comp. It was held that the section of the statute cited contemplates an attack upon the entire reply for the reasons assigned; hence the motion as made was not proper remedy. But here the motion is directed to specified portions of an answer, provided for by section 86, B. & C. Comp., which permits irrelevant or redundant matter inserted in a pleading to be stricken out on motion of the adverse party. As the motion under consideration includes the averment of irrelevancy, and is directed to a part only of the answer, the question is properly raised.[1]

* * * * * * * * * *

[1] See Strook Plush Co. v. Talcott (1908), 129 N. Y. App. Div. 14, at page 356, *supra,* to the effect that an entire count or defense cannot be stricken out as irrelevant, redundant or scandalous.

CATE v. GILMAN.

Supreme Court of Iowa. 1875.

41 Iowa, 530.

DAY, J. We are of the opinion that the court, in refusing to strike out the matter assailed by plaintiff's motion, committed no error prejudicial to him. The most that can be said of the facts stated in these paragraphs is that they aver matters which might be proved under the specific

denials contained in the first paragraph, and that they are therefore unnecessary.

That this alone is not a sufficient cause for striking out a clause in the answer, see *Martin v. Swearengen*, 17 Iowa, 246, cited and relied on by appellant. This is not a case where the same matter is repeated in several clauses or paragraphs. The first paragraph contains the denials of the material allegations of the petition. The second, an admission of the facts not controverted. The third and subsequent paragraphs contain a statement of the facts as the defendant avers them to exist, facts which, for the most part, could be proved under the denials in the first paragraph, which are inconsistent with the allegations of the petition, and which, if proved, disprove the averments made by plaintiff.

Surely it is no prejudice to plaintiff that he is advised of the affirmative matter upon which defendant relies to disprove the allegations of the petition. The code, section 2719, provides that: "The court may, on motion of any person aggrieved thereby, cause irrevelant or redundant matter to be stricken from any pleadings, at the cost of any party whose pleading contains them."[1] This section authorizes the motion to be made only by a person aggrieved.

"A party has a right to set forth his cause of action fully, and unless he burdens his pleading with matters that are totally irrelevant, impertinent, or imposes upon the defendant the necessity of specifically traversing a great number of facts, which are more properly evidence in support of a cause of action, than substantive averments to show that a cause of action exists, the defendant cannot be regarded as aggrieved thereby. * * * Nor is a court taxed with the labor and trouble of minutely inspecting a pleading upon summary motion of this kind for the purpose of ascertaining whether averments are, or are not, relevant, unless in cases where it is absolutely incumbent upon the party to get rid of them, to enable him to frame a proper answer." *Maloney v. Davis*, 15 Howard, 261, cited in notes to section 2946 of the Revision.

The plaintiff sustained no prejudice by the overruling of this motion.[1]

* * * * * * * * * * *

[1] In McGarahan v. Sheridan (1905), 106 N. Y. App. Div. 532, which was an action for specific performance, certain allegations were stricken out of

the complaint. This was held error, the court saying: "It has often been held that in a suit in equity the pleader is not confined with the same degree of strictness to alleging the material facts only as in an action at law. . . . The suit being in equity and it not appearing that the moving party was prejudiced by these allegations they should not have been stricken out."

TOWN OF WAUKON v. STROUSE.

Supreme Court of Iowa. 1888.

74 Iowa, 547.

This is a civil action by the incorporated town of Waukon against L. J. Strouse by which plaintiff seeks to recover of the defendant (an alleged transient merchant), the sum of $1,750 for selling goods within the incorporated town of Waukon without a license, and in violation of an ordinance of said town. A demurrer to the petition was sustained. The plaintiff amended its petition, and the defendant moved to strike out the first count thereof because it had been held bad on demurrer to the original petition. * * *

ROTHROCK, J. 1. The motion to strike was well taken. The grounds of recovery in the first count of the amended petition were substantially the same as in the original petition. Where a party pleads over after a demurrer to his pleading has been sustained, and his amended pleading is the same in substance as the original, the other party is not required to again demur. So far as that count is involved, the question is adjudicated, and the amended pleading presents no question nor case for the court to determine, and it should be stricken from the files.

* * * * * * * * * * *

UPTON v. KENNEDY.

Supreme Court of Nebraska. 1893.

36 Nebraska, 66.

MAXWELL, C. J.: On the 17th of April, 1889, the defendant, M. A. Upton executed a promissory note for $800 to Chittenden, and, to secure the payment of the same, Upton

and wife executed a mortgage upon lot 20, block 3, in Brown Park addition to South Omaha; also, on said date, he executed a second note to Chittenden for $800, and, to secure the payment of the same, himself and wife executed a mortgage upon lots 13 and 14, in block 6, in said addition. On the same date as the first and second notes, Upton executed a third note to Chittenden for $800, and, to secure the payment of the same, himself and wife executed a mortgage to Chittenden on lot 22, in block 3, in the aforesaid addition. Chittenden assigned the mortgages to the plaintiff, and, default having been made, an action was brought to foreclose the same. To the petition so filed, the defendants Upton and wife, filed an answer as follows: "Comes now M. A. Upton and Mary A. Upton, defendants, and, for their separate answer to the petition of the plaintiff herein, they deny each and every allegation in said petition contained." This was duly verified. The plaintiff thereupon filed a motion as follows: "Now comes the plaintiff, and moves the court to strike the answer of M. A. Upton and Mary A. Upton from the files of this court, because the same is sham and frivolous, and bases this motion on the affidavits herewith filed, and the original mortgage selected [executed] by the defendants, Marc A. Upton and Mary A. Upton, together with his notes secured thereby." This motion is supported by three affidavits, in substance, that each of the affiants had had a conversation with Marc A. Upton, and that he had admitted that the notes were genuine, and, impliedly, that he would pay the same as soon as he could. On the hearing of the motion, the judge interrogated the attorneys in the case if they intended to dispute the genuineness of the notes, and they informed the judge that they did not, but insisted that they were entitled to make any defense available under a general denial. The court, however, sustained the motion, and struck the answer from the files as sham, and the plaintiff took a decree of foreclosure and sale by default. The sole question is the ruling of the court on the motion.

A "sham pleading" is defined as one which is good in form, but false in fact. Bliss, Code Pl. § 422; Maxw. Code Pl. p. 553. The Codes of Colorado, Indiana, Iowa, Kentucky, New York, North Carolina, South Carolina, and Wisconsin contain provisions for striking out sham answers or defenses. The subject is not named in the other code states, but, as the power existed at common law, it is no doubt re-

tained under the code. An examination of the cases will show a direct conflict in the decisions as to what answers will be stricken out as sham. The better rule seems to be to treat all answers which are false on their face as sham. Thus, suppose the maker of note or other instrument sued on should, in the verification of his answer, swear that he has no knowledge, information, or belief as to the genuineness of the instrument, and therefore denied the same. In such case the answer would be false on its face, because the alleged maker must have known whether the instrument was true or false. So, if it appears that he had knowledge from public records, it is his duty to examine the same, and frame his answer accordingly. But, unless these facts appear on the face of the record, the court will not enter into an investigation of the facts upon affidavits to determine the *bona fides* of the defense. And particularly is this true where the answer, as in this case, is verified. *Wayland v. Tysen,* 45 N. Y. 281; Pom. Rem. § 685; Maxw. Code Pl. 553. Affidavits are a very imperfect mode of presenting testimony to a court. There being no cross-examination, if skillfully drawn, they may cover up or distort the truth so as to present the facts in a false light. In *Scofield v. Bank,* 9 Neb. 316, this court held that where the answer raised issues of fact, apparently in good faith, the court would not strike it from the files as being untrue. The rule established in that case is the true one, we think, and will be adhered to. The judgment is reversed, and the cause remanded for further proceedings. The other judges concur.[1]

[1] *Bad Faith Essential.* "To warrant applying the severe rule of striking the answer from the record the matter must be shown to be unquestionably false and not pleaded in good faith." Continental Bldg. & Loan Ass'n v. Boggess (1904), 145 Cal. 30.

FIRST NATIONAL BANK OF ST. CLOUD v. LANG.

Supreme Court of Minnesota. 1905.

94 Minnesota, 261.

JAGGARD, J.: * * *

The complaint sets forth a promissory note to respondent, signed by appellant, and guaranteed and transferred to

respondent by another defendant, named Clark. The original answer, besides pleading the general issue, sets forth that the note was executed by appellant solely for the accommodation of said Clark, and without consideration, and that these facts were well known to respondent at the time the note was transferred to it. This answer respondent moved to strike out as sham and frivolous, on affidavits denying said new matter in the answer, and setting forth that the note in suit was given as a renewal of the two other notes signed and delivered by the same parties, and that, after its maturity and frequent demands to pay, appellant wrote three letters acknowledging the debt, and promising to pay or arrange this note. * * * The court granted the motion to strike out the answer as sham and frivolous.

* * * * * * * * * * *

1. The legal sufficiency of defenses to an action to put a promissory note into judgment is ordinarily determined by demurrer, or some appropriate form of motion specifically directed thereto. The truth or falsity of such defenses is normally tried by a jury, with full opportunity for producing, examining, and cross-examining witnesses. Courts properly refuse to try cases on affidavits. A motion to strike out an answer as sham and frivolous will therefore be granted only in extraordinary cases, in which the propriety and necessity of so doing is clear and free from doubt. *Wright v. Jewell,* 33 Minn. 505, 24 N. W. 299. And mere affidavits simply denying the facts alleged in the answer, and asserting their falsity, are insufficient foundation for such an order. *City Bank v. Doll,* 33 Minn. 507, 24 N. W. 300. But where the falsity of the essential facts of a pleading is certainly and indisputably shown, especially when they fail in legal sufficiency, the courts will not permit that pleading to delay or obstruct the administration of justice, but will, on motion, strike it out as sham and frivolous. *Morton v. Jackson,* 2 Minn. 219 (Gil. 180); *Barker v. Foster,* 29 Minn. 166, 12 N. W. 460; *Van Loon v. Griffin,* 34 Minn. 444, 26 N. W. 601; *Stevens v. McMillin,* 37 Minn. 509, 35 N. W. 372; *Dobson v. Hallowell,* 53 Minn. 98, 54 N. W. 939.

The trial court properly granted the motion to strike out appellant's answer. That answer contained a general denial. Therefore respondent could not demur, nor move for judgment on the pleadings. His motion was a proper one. The letters of appellant show the falsity of the general de-

nial, and establish the genuineness of the respondent's claim. He expressly admits them. The new matter set up in the answer—the explanatory statements of his affidavits—tends only to support the alleged defense that the note was executed without consideration and as accommodation paper, and it may be admitted that this was known to respondent. This does not make out a defense. No evidence to maintain it would have been received on the trial, as against the plaintiff, who took the note in the regular course of business before its maturity. A benefit accruing to the person accommodated is a sufficient consideration to sustain the liability of the accommodation maker or indorser. *Tourtelot v. Reed,* 62 Minn. 384, 64 N. W. 928; *Rea v. MacDonald,* 68 Minn. 187, 71 N. W. 11; 7 Cyc. 723; 2 Current Law, 1027, 1028; *Wedge Mines Co. v. Nat. Bank* (Colo. App.) 73 Pac. 873; *Boughner v. Meyer,* 5 Colo. 71, 40 Am. Rep. 139; *Hill v. Coombs,* 93 Mo. App. 264. See, also, *State Bank v. Hayes* (S. D.) 92 N. W. 1068. The answer was frivolous, within the test that, if true, it does not contain any defense to any party of the plaintiff's cause of action, and its insufficiency as a defense is so glaring that the court can determine it upon a bare inspection, without argument. *Nichols v. Jones,* 6 How. Prac. 355.

* * * * * * * * * * *

Judgment affirmed.[1]

[1] *Such Motions Not to Be Encouraged.* "The defendant's right to have a trial of the issues of his case before a jury ought not to be frittered away. . . . If this practice is encouraged or permitted, it is in the power of a plaintiff in every case to file a motion to strike out the answer because it is a sham, and in this way the plaintiff is permitted to have a trial upon affidavits, and if he fails in that, he is still entitled to a trial in the usual and ordinary way. This gives the plaintiff a great benefit, because he hazards nothing by a motion to strike out but costs, while the defendant is precluded from a trial by the court or jury upon oral evidence by an adverse result." In re Bartholomew (1889), 41 Kan. 273.

HAYWARD v. GOLDSBURY.

Supreme Court of Iowa. 1884.

63 Iowa, 436.

ADAMS, J.: The court sustained a demurrer to the original petition, and the plaintiff had leave to file an amended and substituted petition in twenty days. He failed to file it within the time allowed, but filed it several days later. The defendant moved to strike it from the files. The plaintiff asked for time to make resistance to the motion by filing an affidavit of excuse. Time was given until the opening of the court the next morning. * * * The cause came on for hearing upon the motion, and was argued by the defendant in support thereof. At the close of the argument * * * the court * * * sustained the motion to strike the amended and substituted petition from the files, and rendered judgment against the plaintiff for costs.

* * * * * * * * * * *

* * * The failure to file the amended and substituted petition was due to the sheer negligence of the plaintiff's attorney's clerk. Such negligence must be imputed to the plaintiff. The negligence in filing the amended and substituted petition the court might have excused upon a slight showing of excuse, but the affidavit offered appears to us to constitute no showing of excuse. * * * We should hesitate much about interfering with the discretion of the court, even if the case appeared stronger for the plaintiff than it does.

Affirmed.

FRITZ v. BARNES.

Supreme Court of Nebraska. 1877.

6 Nebraska, 435.

LAKE, Ch. J.: The record in this case discloses the fact that the petition when filed in the court below, and at the

time the summons issued thereon ,was neither signed nor verified as the statute requires. In fact these requisites were both entirely wanting. While in this condition the defendants moved "the court to dismiss the suit for the reason that there is no petition filed in said court as required by law." The court sustained this motion and "dismissed the action without prejudice at the plaintiff's costs."

When the defects here mentioned exist in a petition a motion particularly specifying them may be properly interposed to strike it from the files. The sustaining of such a motion will of course compel the plaintiff to file a new petition, properly verified. But so long as such defective petition remains on file it furnishes no ground for dismissing the action, nor can a motion to that end be properly sustained.

For these reasons the judgment of the district court is reversed, and the cause remanded for further proceedings.

Reversed and remanded.[1]

[1] *Necessity and Form of Verification.* There are matters of local practice and no useful purpose would be served by going into them at large. There is, however, some uniformity in the various statutes, which enables them to be grouped according to certain common features. Thus, the provision is frequently met with that the execution of a written instrument sued on can be put in issue only by a verified denial, that is, by a denial supported by an affidavit of truth. Other statutes provide that corporate existence, agency or authority, capacity to sue, want or failure of consideration, the correctness of an account, can be put in issue only by a verified denial.

In some states every pleading of facts must be verified. In others, if any pleading is verified every subsequent pleading must be verified. Statutes frequently require the verification of pleadings in certain classes of actions.

The form of verification is frequently prescribed by statute; and the persons who may verify, such as agents, attorneys or officers, together with the circumstances under which their verification will be allowed, are often designated.

SECTION 3. MOTION TO MAKE MORE DEFINITE AND CERTAIN.

CASEY v. DORR.

Supreme Court of Arkansas. 1910.

94 Arkansas, 433.

McCULLOCH, C. J.:

* * * * * * * * * * *

The complaint alleges that appellee did willfully and maliciously, and without probable cause, induce the grand jury

to find an indictment against appellant, and did willfully and maliciously, and without probable cause, instigate, aid, and abet, advise, and encourage the prosecution of the charge under said indictment. We are of the opinion that the complaint stated a cause of action. The allegation should have been made more specific, by stating the means by which the finding of the indictment was procured and the prosecution instigated; but this defect should have been reached by a motion to make the complaint more definite and certain. *Johnson v. Douglass*, 60 Ark. 39, 28 S. W. 515; *Bush v. Cella*, 52 Ark. 378, 12 S. W. 783. The court might properly have treated the demurrer as a motion to make the complaint more definite, and, after sustaining it, given appellant an opportunity to amend. But that is not what the court did. It decided by sustaining the demurrer that no cause of action was stated at all, and therefore appellant was not called on to make his complaint more definite.

Reversed and remanded.[1]

WOOD, J., dissents.

[1] In a few code states (California, Idaho, Colorado and Montana) a special demurrer is provided for ambiguity and uncertainty, and this has been held in California to be the exclusive remedy. (McFarland v. Holcomb (1898), 123 Cal. 84.)

GRIMES v. CULLISON.

Supreme Court of Oklahoma. 1895.

3 Oklahoma, 268.

DALE, C. J.: * * *

1. Upon the first proposition it appears from the record that, in the motion to make more definite and certain, the defendants below failed to point out wherein the petition was indefinite and uncertain, and we do not think, in the absence of such matter in a motion, the court below committed any error in overruling the same. If the petition be indefinite or uncertain, it is the duty of counsel, in moving to have the same made more definite and certain, to specifically set out wherein they desire relief at the

hands of the court. If they fail to so set out in their motion, it is not error to overrule the same.

* * * * * * * * * * *

BLAIR v. WILKESON COAL AND COKE COMPANY.

Supreme Court of Washington. 1909.

54 Washington, 334.

FULLERTON, J.: The respondent brought this action to recover for professional services rendered the appellant. * * *

* * * * * * * * * * *

The appellant first contends that there is a fatal variance between the pleadings and the proofs. He contends that the complaint is based on an express contract, and a breach thereof on the part of the appellant, and that the respondents were entitled, because of the breach, to receive the full contract price, while the case was tried on the theory of a quantum meruit; that is, that the respondents performed services at the request of the appellant and were entitled to recover the reasonable value of such services. It must be conceded, we think, that the complaint is so worded as to lend color to the claim that it was capable of two constructions, one, that it is an action to recover on an express contract for the performance of certain services, regardless of the value of the services rendered, and, the other, that it is an action to recover on a quantum meruit for services rendered under a contract after a breach of the contract; the complainant waiving the right to sue in damages for the breach. But, since the complaint was thus capable of a double construction, the appellant's remedy was not to claim a variance between the pleadings and proofs. It could, prior to taking issue thereon, have by motion compelled the respondents to make the complaint more definite and certain, or could at any time before entering on the trial have compelled them to elect on which theory of the complaint they would proceed; but by entering on the trial these objections were waived, and the appellant's sole right thereafter was to combat the case as made

by the evidence. It was of no avail therefore to claim a variance between the pleadings and proofs. In fact, there was no such variance. It was merely a case where the plaintiff had a choice of remedies, and his complaint did not make clear which remedy he had chosen.

* * * * * * * * * * *

CORNELL v. HAIGHT.

Supreme Court of Nebraska. 1910.

87 Nebraska 508.

BARNES, J.: This was an action at law to recover for services alleged to have been performed for defendants by plaintiff at their special instance and request in making or compounding a certain medicine called "Co-lon-co." The plaintiff had the verdict and judgment, and the defendants have appealed.

The petition contains two counts, and charges, in substance, that on or about the 1st day of September, 1904, the defendants Haight and Webster, doing business under the name and style of P. B. Haight & Co., contracted to and with the plaintiff to manufacture for them a medicine known as "Co-lon-co," for which they were to furnish all the ingredients, except those of a secret formula, together with the bottles and labels; that defendants were to put the same upon the market, and, when sold, they were to pay the plaintiff therefor 37½ cents per bottle; that her services were to be performed at such times as the defendants demanded; that, in accordance with this agreement, plaintiff did between the 1st day of September, 1904, and the 1st day of April, 1905, manufacture, prepare and deliver to the defendants 1,500 bottles of Co-lon-co; that the defendants accepted, received, and sold the same, but have failed, neglected, and refused to pay the plaintiff therefor; that there is now due to her from the defendants upon her said first cause of action the sum of $562.50.

* * * * * * * * * * *

1. It appears that the defendants, before filing their answer, attacked plaintiff's petition by motion to require

her to make it more definite and certain by setting forth the ingredients of the secret formula mentioned therein. The motion was overruled, and for this error is assigned. It is also contended that the trial court erred in refusing to require the plaintiff to disclose the nature of her secret formula on cross-examination. Those two assignments will be considered together. It must be observed that the issues tendered by the petition and finally made by the pleadings were: First. Did the plaintiff make and deliver to the defendant 5,000 bottles of Co-lon-co, or any part thereof for the agreed compensation of 37½ cents per bottle, to be paid for when sold by them? Second. Had the medicine so made and delivered been sold at and before the filing of her petition? It follows, therefore, as a matter of course, that the nature and ingredients of the so-called secret formula, if there was one, were wholly immaterial, and had no place in the controversy. If the medicine was made for, delivered to, and sold by defendants to their customers without complaint on the part of the latter, the plaintiff should recover regardless of what it contained. The district court was therefore right in overruling the motion and excluding the evidence above mentioned.

* * * * * * * * * * *

COMMONWEALTH COMPANY v. NUNN.

Court of Appeals of Colorado. 1902.

17 Colorado Appeals, 117.

GUNTER, J.: The complaint avers that plaintiff at the times therein mentioned was the owner and in the actual possession of certain mining claims and mill sites, also a stamp mill and other improvements situate thereon; that defendants at such times unlawfully, by force and violence, entered upon said premises, destroyed part of a building, and removed a portion of the machinery used in operating said property, and that defendants threaten, by force, to re-enter said premises, eject the plaintiff therefrom, and to destroy the buildings, machinery, and other improve-

ments thereon; that defendants will commit such acts unless restrained by order of court.

The insolvency of each of the defendants is also averred.

Defendants Nunn and the Transmission Company moved an order requiring the complaint to be made more specific and certain. This motion was sustained, plaintiff declined to amend, and, to review the resultant judgment of dismissal brought this appeal.

Defendant Nunn says that the complaint does not designate the particular wrongful act done by each defendant; that trespasses are alleged to have been committed by certain individuals, yet it is not alleged that such individuals in so acting were his agents; that it is not alleged that he in any manner conspired with his codefendants in doing the acts charged.

We answer that the complaint charges every act complained of to have been committed by defendants acting jointly, either through themselves or others. Plaintiff was not required to set out the evidence by which these ultimate facts were to be proven.

Defendant the Transmission Company says, further, that the complaint lacks certainty in not averring through what particular officers, agents, or employes of it the supposed trespasses were committed, and that without such specific allegation it cannot investigate and determine whether such trespasses were committed. This was asking plaintiff to plead its evidence, which it was not required to do.

In *Wood v. Railway Co.* (Minn.) 35 N. W. 5, defendant moved for an order requiring the complaint to be made more definite and certain by alleging the officials through whom it negotiated and entered into the contract, a violation of which was complained of, saying that without such knowledge the complaint could not be safely answered, nor could witnesses without great expense be procured for the trial. The motion was denied, the court saying, *inter alia*: "The uncertainty * * * complained of is not as to what the complaint alleges, but as to what particular evidence the plaintiff may produce to support it. * * * What defendant asks is that the plaintiffs be required to plead the names of the particular officers or agents claimed to have done or committed these acts. * * * To require this would be unprecedented, and

subversive of the most familiar and well-established rules of pleading."

Judgment reversed.

Reversed.

PUGH v. WINONA AND ST. PETER RAILROAD COMPANY.

Supreme Court of Minnesota. 1882.

29 Minnesota, 390.

DICKINSON, J.: The plaintiff, an employe of the defendant, was injured, as appears from the complaint, by reason of a loaded freight car, upon which plaintiff was engaged as a brakeman, running off the track. The complaint alleges that the car had been sent loaded from Pittsburgh, Pennsylvania, and in course of transit to its destination was received by the defendant upon its line of road, and was being run thereon by the defendant when the accident occurred. The complaint alleges that when the car was received by the defendant, and from that time until the accident occurred, it "was in a bad, damaged, worn, defective, unsafe, unfit, and improper condition for use, in that all the wheels on one end of said car were both worn and loose upon the axles of said car to such an extent as to render said car wholly unfit and unsafe for use; that said wheels were both so loose and so much worn that the same would wabble sideways on its axle when said car was in motion, and cause the same to jump the track; *and the said car was badly constructed and out of repair in other respects, which contributed to plaintiff's injury, all* of which the defendant knew," etc.

The defendant, upon affidavit showing want of knowledge respecting the defects thus generally alleged, and its inability, in consequence, to make its answer or to prepare for trial, moved for an order requiring the complaint to be made definite in respect to the allegation above quoted in italics. The motion was denied upon hearing, and defendant appealed from the order denying the motion.

* * * * * * * * * * *

2. Did the court err in denying the motion? The affidavit of the plaintiff's attorney, presented in opposing the motion, showed that diligent effort had been made by plaintiff and his attorney to ascertain the precise defects in the car, but that they had been unable to do so further than alleged in the complaint. No reason or foundation is given to support the truth of the averment in the complaint as to other defects than those specifically named therein. As the case was presented to the court below, and as it is before us, it would seem that the case of plaintiff really rested upon the facts specifically pleaded. The affidavit referred to shows this *prima facie,* and such was the view taken by the learned judge of that court; for in the memorandum accompanying the order in question he says: "It appears in the case at bar, from the affidavit and statement of plaintiff's counsel, that he has in good faith alleged all the defects in the car known to the plaintiff or his counsel, and that they are the defects he intends to rely upon on the trial; * * * that the object of the general allegation complained of is to prevent the plaintiff from being barred from proving other defects, if any such should come to his knowledge." We concur thus far in the view of the learned judge, but it leads us to a conclusion different from his. Under these circumstances, the allegation objected to, since it could not be cured by the amendment, should not have been allowed to stand, but should have been stricken out. If, at a later stage of the case, other facts should come to the knowledge of the plaintiff, it would be in the power of the court to allow the pleading of such facts by amendment. We do not decide that a pleading, although in some respects indefinite, may not, under any circumstances, be allowed to stand without amendment, as a proper, and the only possible, form of pleading.

The order appealed from is reversed.

SECTION 4. MOTION TO ELECT.[1]

DARKNELL v. COEUR D'ALENE AND ST. JOE TRANSPORTATION COMPANY.

Supreme Court of Idaho. 1910.

18 Idaho, 61.

AILSHIE, J.: This action was commenced for the recovery of judgment for services rendered by the plaintiff to the defendant corporation. * * *

* * * * * * * * * * *

When the case came on for trial, the defendant filed a motion "to require plaintiff to elect between two causes of action to proceed upon and to strike." The court appears to have sustained this motion and made an order requiring the plaintiff "to elect between the two separate and distinct causes of action set forth in his complaint herein, and that all of said complaint relative to any cause of action other than the one plaintiff elects to retain in his complaint be stricken from said complaint." The plaintiff protested against this action, took his exception, and thereupon elected to proceed upon the contract as set out in his complaint for the recovery of a stipulated salary. * * *

It was contended by the defendant on its motion to require the plaintiff to elect, and is contended in this court, that the plaintiff had improperly commingled two separate and independent causes of action in one count. In other words, it is insisted that the complaint charged a pretended cause of action on the contract for a stipulated salary and also a pretended cause of action on quantum meruit. This contention seems to have been based on the fact that the plaintiff inserted in his complaint the allegation that the services were of the reasonable value of the amount alleged. If this contention be correct, still the proper method of reaching the objection would not be by motion to require the plaintiff to elect. The two causes of action would not be inconsistent. If improperly united and commingled in one count, the proper motion would have been to require

[1] As to the cases when the court will or will not sustain a motion to elect, see Chapter III, Section 5, *supra*.

the plaintiff to separately state his several causes of action. * * *

* * * * * * * * * * *

SECTION 5. MOTION FOR JUDGMENT ON THE PLEADINGS.

LE BRETON v. STANLEY CONTRACTING COMPANY.

Court of Appeals of California. 1911.

15 California Appellate, 429.

LENNON, P. J.: This is an appeal from a judgment of the Superior Court of the city and county of San Francisco, rendered and entered in favor of the plaintiff and against the defendants James Stanley and the Stanley Contracting Company.

These defendants, on the 29th day of October, 1907, were indebted, upon their promissory note in the sum of $2,262.35, to the California Safe Deposit & Trust Company, a banking corporation. The note was dated May 15, 1907. It was due in 90 days from its date, and bore interest at the rate of 6 per cent. per annum, payable monthly, and if not so paid to be compounded. On October 30, 1907, the California Safe Deposit & Trust Company suspended, closed its doors, and never resumed business.

The plaintiff, E. J. Le Breton, as the duly appointed, qualified, and acting receiver of the defunct bank, brought suit upon the note, and after an order sustaining his demurrer to the answer of the defendants, without leave to amend, obtained a judgment against them on the pleadings for the full amount of the principal and interest due on the note.

The allegations of the complaint with reference to the court's order adjudicating the bank to be insolvent, and appointing the plaintiff its receiver, are the only allegations attempted to be denied by the answer of the defendants, and the denial in each instance is made and based upon lack of information or belief. There is no denial or attempted denial in the answer of the due execution of the

note, or of the amount of the indebtedness due thereon as set out in the plaintiff's complaint.

As a separate defense and by way of counterclaim, the answer of the defendants averred, in substance, that, on October 29, 1907, one Kittie J. McCue, who was then a commercial depositor with the California Safe Deposit & Trust Company in the sum of $2,400 and upwards, made and delivered to defendants her check, drawn thereon in favor of the Stanley Contracting Company, for the sum of $2,400. By reason of the failure of the California Safe Deposit & Trust Company, said check was never paid or presented for acceptance and payment, and has ever since been held by defendants. It was not alleged in the answer that the check had ever been certified or accepted by the bank, or that the check was drawn against a special fund, or for the precise balance on deposit with the bank and to the credit of Kittie J. McCue.

Plaintiff demurred to the allegations of the answer, upon the ground that the same were insufficient to constitute either a defense or an offset to the cause of action stated in the plaintiff's complaint. With the demurrer plaintiff filed a motion for judgment on the pleadings. The demurrer and motion apparently were heard and considered together. On January 17, 1910, the demurrer was sustained without leave to amend, and the motion was granted. * * *

The court did not err in sustaining the demurrer without leave to amend.

The check in question was never presented to or accepted by the bank, and therefore as to the bank it was not an assignment to the Stanley Contracting Company of the amount called for in the check. * * *

* * * * * * * * * * *

No right of action on the check existed in favor of the Stanley Contracting Company, no right of counterclaim or set-off could possibly arise out of the facts stated in the answer, and therefore the order of the court sustaining the demurrer without leave to amend was the only proper ruling which could have been made in the premises.

The truth of the allegations of the complaint, with reference to the order adjudicating the bank insolvent and appointing the plaintiff its receiver, could have been readily ascertained by the defendants from an inspection

of the court records, and therefore the defendants' denials of these allegations for lack of information or belief were wholly insufficient. *Mulcahy v. Buckley,* 100 Cal. 487, 35 Pac. 144. Denials in this form, with knowledge or means of knowledge as to the truth or falsity of the allegation attempted to be denied, are never permissible. They may be disregarded by the court (*Mullally v. Townsend,* 119 Cal. 52, 50 Pac. 1066); and if the answer fails otherwise to put in issue the material allegations of the complaint, judgment may be rendered and entered on the pleadings. *Doll v. Good,* 38 Cal. 287.

* * * * * * * * * *

A motion for judgment on the pleadings is similar in purpose and effect to a demurrer grounded upon the alleged insufficiency of the facts stated in a pleading. It admits the facts alleged, and challenges their sufficiency to support a cause of action or maintain a valid defense. *De Toro v. Robinson,* 91 Cal. 371, 27 Pac. 671. The plaintiff in this case was privileged to take advantage of the alleged defect in the defendants' pleading by demurrer or motion for judgment (*Kelley v. Kriess,* 68 Cal. 210, 9 Pac. 129), either or both of which, if successful, would be sufficient upon which to found a judgment.

* * * * * * * * * *

The judgment is affirmed.[1]

HALL, J., and KERRIGAN, J., concurred.

[1] "A motion for judgment on the pleadings is not a demurrer. It partakes of some of the qualities of a demurrer but it is not a demurrer, and hence it is not a part of the record. It is a matter of exception and can only be made a part of the record by a bill of exceptions.

"It partakes of the nature of a demurrer, in that, it admits all facts that are well pleaded, and if it is overruled the order overruling it is not a final judgment from which an appeal will lie, but the party may plead over or proceed to trial on the issues joined. On the contrary, if it is sustained, judgment goes at once, whereas if a demurrer is sustained the order is not a final judgment, the party has a right to plead over, and it is only in case of refusal to plead over that final judgment can be rendered on demurrer." Sternberg v. Levy (1900), 159 Mo. 617.

THOMAS v. RAY.

Supreme Court of Colorado. 1910.

48 Colorado, 423.

Mr. Justice GABBERT delivered the opinion of the court:

Plaintiff in error commenced an action in replevin against defendant in error for the possession of two bulls, and damages for their alleged wrongful detention. For answer the defendant interposed two defenses, consisting of (1) what was intended to put in issue the allegations of the complaint, and (2) what appears to have been regarded as an affirmative defense, to which the plaintiff filed a replication. Plaintiff then filed a motion for judgment on the pleadings, which was overruled, and later, having announced in open court that he elected to stand upon this motion, the cause, on motion of defendant, was dismissed at the cost of plaintiff. From this judgment the plaintiff has brought the case here for review on error.

* * * * * * * * * *

The action appears to have been commenced about March 2, 1907. Plaintiff alleges that he was the owner and entitled to the possession of the animals in controversy at that ime. The defendant denies that plaintiff was the owner or entitled to the possession of the animals at any time since on or about the 21st day of July, 1906, a date anterior to the commencement of the action. This denial certainly puts in issue the averments of ownership and right of possession, as alleged by the plaintiff. The action in replevin is primarily an action for possession. With this in issue, plaintiff was not entitled to recover unless he established, by competent testimony, his right to possession when the action was commenced. For the purpose of showing that he did not then have that right, the defendant, under his denial, could have introduced evidence that the right of possession was at that time vested in him or in some third person. Such being the situation of the parties with respect to the introduction of testimony, from which the facts would be determined fixing their rights to the subject-matter of controversy, it is clear that an issue on the right of possession was tendered by

the answer. In other words, where the pleadings raise a material question of fact which must be determined from testimony before a judgment can be rendered, a motion for judgment on the pleadings must be denied. *Cache La Poudre I. Co. v. Hawley,* 43 Colo. 32. Whether or not other averments of the complaint were put in issue by the defense under consideration is immaterial. The gist of plaintiff's right to maintain his action was put in issue, and he could not recover unless he at least proved his right of possession, even though other averments in his complaint were admitted by failure to deny, for the reason that a motion for judgment on the pleadings cannot be sustained unless under the admitted facts the moving party would be entitled to judgment, without regard to what the findings might be on the facts upon which issue is joined—*Mills v. Hart,* 24 Colo. 505; *Rice v. Bush,* 16 Colo. 484—or, as held by other authorities, judgment upon the pleadings cannot be rendered in favor of plaintiff unless upon the admission of the answer no other judgment is possible than that prayed in the complaint.—*Roberts v. Colo. Springs & I. Ry. Co.,* 45 Colo. 188.

* * * * * * * * * *

It is urged that the second defense is evasive and contradictory, and does not tender any material issue. Inasmuch as the first defense tendered a material issue, the sufficiency of the second defense in this respect is of no moment. Each defense stands by itself, and must be tested by what it contains. A judgment cannot be rendered on the pleadings on motion of the plaintiff where the answer contains a denial of the material allegations of the complaint, even though the answer sets up a special defense separately stated, which admits the allegations of the complaint by failure to deny. *Nudd v. Thompson,* 34 Cal. 39; *Amador Co. v. Butterfield,* 51 Cal. 526.

* * * * * * * * * *

The judgment of the district court is affirmed.[1]

Affirmed.

Chief Justice STEELE and Mr. Justice HILL concur.

[1] *Accord:* Gobe v. Coughlin (1910), 83 Kan. 522; Gatliff v. Johnson (1910), 140 Ky. 282; Casci v. Ozalli (1910), 158 Cal. 282; Penny v. Ludwick (1910), 152 N. C. 375; Godwin v. Liberty-Nassau Bldg. Co. (1911), 144 N. Y. App. Div. 164.

In Gerard-Fillio Company v. McNair (1912), 68 Wash. 321, the court said that the practice of moving for judgment on the pleadings "for some

formal defect in the pleadings which could be cured by amendment was not to be commended, but that where the motion goes to the substance of the action or defense and not to the mere form of the allegation, there was no reason why the practice should not receive the sanction of the courts."

SECTION 6. RENEWAL OF MOTION.

RICE v. VAN WHY.

Supreme Court of Colorado. 1910.

49 Colorado, 7.

This is an action by Mrs. W. A. Van Why, begun December 5, 1899, in the district court of Teller county, to recover $5,000 from D. H. Rice and W. R. Coe, copartners under the firm name and style of the Joe Dandy Gold Mining Company, engaged in operation and developing the Joe Dandy lode mining claim in the Cripple Creek district, for the death of her husband, which occurred while employed by the defendants in that work, through, as is said, their negligence in failing to supply a proper and reasonably safe hoist on the property for use by the employes, while mining in a shaft thereon. * * *

* * * * * * * * * * *

Mr. Justice BAILEY delivered the opinion of the court:

* * * * * * * * * * *

The next point urged for reversal is that, on June 16, 1901, a motion was sustained by the then judge, to strike from the original complaint the allegations thereof to the effect that the hoist in question was unprovided with safety bands, brakes and clutches to guide and govern its drum when at work and in operation, as being irrelevant, incompetent and immaterial, since other allegations of the complaint show conclusively, as is said, that the sole proximate cause of the accident was the falling out of the key which locked the small pinion wheel to the main shaft of the hoist. That afterwards, and on July 9, 1901, by leave of court first had, another judge then sitting, the amended complaint, on which trial was had over defendant's objection, was allowed to be filed, containing in substance the allegations which had been theretofore stricken. A like

motion was again interposed on July 17, 1901, to strike these allegations from the amended complaint. The contention is that the original ruling is *res judicata*. That it is not competent for one judge of concurrent jurisdiction to review prior rulings, and, in effect, set aside orders of a co-ordinate judge, and particularly after the expiration of six months, after the lapse of the term at which such rulings were made.

Appellant says the original ruling and order on the motion is a final judgment, and fixes the law on that point, until overruled by a court of review. The leave given was to file an amended complaint, then followed the motion to strike those matters therefrom, repleaded substantially as in the original complaint. Whether the amended complaint should be filed was a matter fairly discretionary with the judge to whom the application was made. While, in view of all the facts disclosed, we are not disposed to unqualifiedly approve the practice indulged, still we do not regard that order, in the circumstances of the case, as properly reviewable. The court's action finds support in general authority, and as well in our decisions.

It will scarcely be denied that the court, at any time, before trial and final judgment, had the power, if convinced of error, to correct the same as it might be advised. The ruling on the motion to strike was not of such a final or conclusive character as to preclude the action taken, even after the expiration of the term. It was the same court acting at all times, and as such it clearly had this power and might properly exercise it. The fact that a different judge was sitting worked no limitation upon the power and authority of the court. We doubt if it will be questioned that the judge, who made the original order, had the right, if exercised in apt time, to change his mind and withdraw or modify it, if advised, as matter of law, that such action was due the plaintiff. If this be true, and it seems reasonable, it follows that another judge, presiding over the same court, having like power and authority, might also properly make a like order.

In 15 Enc. Pl. & Pr. at pages 349-351, the law is stated thus:

"Orders are not regarded as *res judicata* with the same strictness as in the case of judgments. Accordingly, every order made in the progress of a cause may be rescinded or

modified upon a proper case for such relief being made out. During the term at which the order was made this power of the court is plenary and undoubted, and it has been held that the power exists and may be exercised at any time, even after expiration of the term, provided the proceedings are still *in fieri*, and no final judgment or order has been entered putting the case out of court."

In *Rockwell v. District Court*, 17 Colo. 118, this court, speaking to a question of like import, said:

* * * * * * * * * * *

"The doctrine of *res judicata* is applicable only to those judgments, decrees, orders or rulings of record which are so far material and final that a review thereof may be had through the ordinary procedure provided, such as appeals or writs of error. The granting or refusing of other applications or motions does not necessarily prevent a subsequent renewal thereof upon the same or different grounds where jurisdiction over the subject-matter remains in the same tribunal. A dignified and orderly procedure has undoubtedly prompted the recognition by courts of the rule forbidding repeated applications to rehear motions of the latter class on grounds previously urged. But this rule is not based upon the principle of *res judicata;* and the entertainment of such renewed applications is purely discretionary with the court. A proper respect for judicial announcements has led to the established practice of submitting a preliminary petition to the court for leave to renew the motion denied. But the court itself may waive this rule of procedure; and if without objection it entertains the motion challenging its former ruling and reconsiders the same on the merits, its action will be treated as if such preliminary leave had been granted.[1]

* * * * * * * * * * *

[1] *Accord:* Holtz v. Smith-Morgan Printing Co. (1911), 150 Iowa 91; Lawson v. Lawson (1911), 15 Cal. App. 496; Heidel v. Benedict (1894), 61 Minn. 170.

CHAPTER IX.

BILLS OF PARTICULARS.

TILTON v. BEECHER.

Court of Appeals of New York. 1874.

79 New York, 176.

This was an action for *crim. con.*

The complaint alleged that defendant had criminal intercourse with plaintiff's wife, "on or about the 10th day of October, 1868, and on divers other days and times after that day, and before the commencement of this action," at the house of the plaintiff, and at the house of the defendant, in Brooklyn. The motion was that plaintiff be required to deliver to defendant's attorney "a statement in writing of the particular times and places at which he (plaintiff) expects or intends to prove that any acts of adultery or criminal intercourse took place between the defendant and the wife of the plaintiff." The motion was denied, as is stated in the order, "on the ground that the court had no power to grant the same, and on the other grounds stated." * * *

RAPALLO, J.: The only question arising upon the present appeal, which is reviewable in this court, is whether or not the court below had no power to grant the application of the defendant.

* * * * * * * * * * *

It may not be absolutely essential to consider the question, whether the particulars sought could have been obtained under section 160, by an application to make the complaint more definite and certain. If the power to order particulars existed before the enactment of that section, it is not thereby abrogated; the most that could be said upon the subject is that, if section 160 affords an appropriate remedy the court might require the party to resort to that remedy. Both remedies might consistently

exist together. But so much stress has been laid on the assertion that a remedy could have been obtained under section 160 that it is proper to ascertain whether or not that position is sound.

The language of the section is: "When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain."

It will be observed that it is only where the precise *nature* of the charge is not apparent that an application can be made under this section. It enables a party to obtain a definite statement in the pleading of the *nature* of the charge intended to be made against him, but not of the particulars or circumstances of time and place. For this purpose a different proceeding is pointed out, viz., an application under section 158, which provides among other things that "*the court may in all cases* order a bill of particulars of the claim of either party to be furnished."

It is evident that in the present case there was no occasion for an application under section 160 to make the complaint more definite and certain. There is no uncertainty or indefiniteness in respect to the *nature* of the charge made against the defendant. The difficulty under which he claims to be laboring is that the complaint does not point out the times or occasions when the alleged offenses are claimed to have been committed, but avers simply that they were committed "on the 10th of October, 1868, and on divers other days and times after that day and before the commencement of this action," thus covering a period of very nearly six years, the action having been commenced in August, 1874. He denies that the acts charged were ever committed, but claims that for the purpose of preparing his defense it is necessary that he should be furnished with the particulars of time and place, in order that he may summon witnesses to rebut such evidence as may be brought against him, to explain the circumstances which may be proved and upon which the plaintiff may rely to establish the charge.

In actions upon money demands consisting of various items, a bill of particulars of the dates and description of the transactions out of which the indebtedness is claimed to have arisen, is granted almost as a matter of course, and this proceeding is so common and familiar, that when

a bill of particulars is spoken of, it is ordinarily understood as referring to particulars of that character. But it is an error to suppose that bills of particulars are confined to actions involving an account, or to actions for the recovery of money demands arising upon contract. A bill of particulars is appropriate in all descriptions of actions where the circumstances are such that justice demands that a party should be apprised of the matters for which he is to be put for trial with greater particularity than is required by the rules of pleading. They have been ordered in actions of libel; escape (*Davies v. Chapman,* 6 Ad. & El. 767; 7 D. & R. 774); trespass (*Johnson v. Birley,* 5 B. & A. 540); trover (*Humphrey v. Cottleyou,* 4 Cow. 54), and in ejectment (*Vischer v. Conant,* 4 Cow., 396). Even in criminal cases the instances in which the courts have, by analogy to the practice in civil actions, ordered bills of particulars, are frequent, viz.: On an indictment for being a common barrator, where a general form of pleading is allowed. (Hawkins' P. C., B. 1, chap. 83, sec. 13; *Goddard v. Smith,* 6 Mod. 261; *Commonwealth v. Davis,* 11 Pick. 432.) On an indictment for nuisance the prosecutor has been required to specify particulars of the separate acts of nuisance which he intended to prove (*Rex v. Carwood,* 3 Ad. & El. 815; *Regina v. Flower,* 3 Jur. 558), and in a prosecution for embezzlement (*Rex. v. Hodgson,* 3 Carr & P. 422; *Rex v. Bootyman,* 5 id. 300); and in England there is nothing more common at the present day than to order particulars to be filed in an action for divorce, either on the ground of cruelty or adultery; and this is done on the application either of the defendant, or, in cases where the wife is defendant, of the person with whom she is alleged to have committed adultery, and who under the statute of 20 and 21 Victoria, chapter 85, is joined with her as co-respondent for the purpose of being mulcted in damages. * * *

* * * * * * * * * *

A reference to a few of the authorities upon which these decisions were founded, will show that in almost every kind of case in which the defendant can satisfy the court that it is necessary to a fair trial that he should be apprised beforehand of the particulars of the charge which he is expected to meet, the court has authority to compel

the adverse party to specify those particulars so far as in his power. * * *

* * * * * * * * * * *

Most of the authorities which I have mentioned consist of adjudications prior to the amendment of 1849 to section 158 of the Code of Procedure, which is in these words: "And the court may, *in all cases,* order a bill of particulars of the claim of either party to be furnished.

It must be borne in mind that we are now discussing simply a question of power, whether, in the case before us, the court below had power to order particulars to be furnished; not whether, upon the facts disclosed by the affidavits, the court below ought or ought not to have ordered particulars, but whether it had the *power* so to do. If it made a mistake in that respect we must correct it.

If the code had been silent upon the subject of bills of particulars, the four hundred and sixty-ninth section [1] would probably have sufficed to preserve the authority of the court to order particulars in all cases before accustomed. But the express authority conferred by section 158 to order particulars in *all cases,* especially when read in view of the cases which have been cited, and in which particulars had been ordered, would seem to place the question beyond doubt.

* * * * * * * * * * *

Our conclusion is, that the orders of the special and general terms of the city court of Brooklyn be reversed, without costs, and the case remitted, to be heard at special term, that its discretion may be exercised upon the merits.[2]

* * * * * * * * * * *

All concur with RAPELLO, J., except ALLEN, J., who was for dismissal of the appeal; and GROVER, J., who doubted the existence of the power, but concurred with ALLEN, J.

[1] This statute seems to be the following: "The present rules and practice of the courts in civil actions, inconsistent with this act, are abrogated, but where consistent with this act, they shall continue in force, subject to the power of the respective courts to relax, modify, or alter the same." Voorhies Code, 1867, § 469.

[2] In Conover v. Knight (1893), 84 Wis. 639, the court said: "We are not disposed to draw any nice distinction between the functions of an order for a bill of particulars and an order requiring a pleading to be made more definite and certain, for we think such distinction has no tangible existence in reason or law." This statement was cited with approval in Stocklen v. Barrett (1911), 58 Ore. 281.

BOARD OF COUNTY COMMISSIONERS v. AMERICAN LOAN AND TRUST COMPANY.

Supreme Court of Minnesota. 1899.

75 Minnesota, 489.

START, C. J.: This is an action on a bond given by a depositary of public funds, the American Loan & Trust Company, and its sureties. * * * The complaint alleges the execution of bond, its acceptance, the designation of the trust company as a depositary, the deposit of county funds with it, and that on July 14, 1894, there was on deposit with the trust company, and upon open and current account, of the money deposited with it by the county treasurer, the sum of $98,368.20, and the further sum of $7,772.87; and that the county treasurer duly demanded of the trust company, on the day named, the payment of the amount so on deposit with it, which was refused. * * *

* * * * * * * * * * *

The counsel for respondent, insisting that the appellants were not entitled to a bill of particulars as a matter of right, served one, as a matter of grace, after the time limited for such service, if he was bound to furnish it, which was returned by the appellants. It is only where an account is set forth in a pleading that is alleged as a cause of action, counter-claim, or set-off that the adverse party is entitled to a bill of particulars as a matter of right or demand. Gen. St. 1894, § 5246;[1] *Board v. Smith*, 22 Minn. 97; *Jones v. Trust Co.*, 67 Minn. 410, 69 N. W. 1108; *Dowdney v. Volkening*, 37 N. Y. Super. Ct. 313; *Cunard v. Francklyn*, 49 Hun. 233, 1 N. Y. Supp. 877. This action is not upon an alleged account, but upon the bond, for a breach of its conditions. It is true that, to establish the breach, it was necessary to allege and prove the amount

[1] This statute provides in part as follows: "It is not necessary for a party to set forth, in a pleading, the items of an account therein alleged; but he shall deliver to the adverse party, within ten days after a demand thereof, in writing, a copy of the account verified," etc.

"The court, or judge thereof, may order a further or more particular bill."

Bills of particulars are seldom expressly authorized in very general terms under the codes, and the above is a very common form of provision. For this reason they are used much less frequently than motions to make more definite and certain.

of the county funds on deposit with the trust company at the time of the alleged breach, but the accounts between the parties were the mere data or evidence tending to establish the amount of the deposit. If the complaint did not set forth sufficient particulars as to the amount of the deposit to enable the defendants to answer understandingly, and adequately defend themselves, their remedy was by motion to make the complaint more definite and certain. Such was the remedy sought and granted in the case of *City of Rochester v. McDowell* (Sup.) 12 N. Y. Supp. 414, cited and relied on by the appellants. The appellants were not entitled to a bill of particulars as a matter of right, and the trial court committed no errors in the premises of which they can complain.

Judgment affirmed.

DUDLEY v. DUVAL.

Supreme Court of Washington. 1902.

29 Washington, 528.

ANDERS, J.: This was an action to recover the amount alleged to be due plaintiff from the defendants for services rendered by the former for the latter. The cause of action, as stated in the complaint, is as follows: "(4) That the defendants are indebted to the plaintiff in the sum of seven hundred and eighty-four and 15/100 dollars ($784.15) for services rendered by the plaintiff for the defendants at the special instance and request of the defendants, for which the defendants each agreed to pay the plaintiff. (5) That the said sum of seven hundred and eighty-four and 15/100 dollars is now due from the defendants to the plaintiff, and is wholly unpaid." The defendants interposed no motion to require the plaintiff to make his complaint more definite and certain, but it seems to be conceded that the defendants Duval and Fitch did demand a bill of particulars of the plaintiff's claim. In response to this demand the plaintiff made a statement in writing, which was filed in the cause. * * *

The defendants Duval and Fitch then demurred to the complaint as amplified by the bill of particulars, on the ground that it stated several causes of action not properly joined. This demurrer was overruled, and the demurring defendants excepted. * * *

And it is contended by the appellants that the complaint, *as amplified by the bill of particulars*, states two distinct causes of action improperly united, and that the court, therefore, erred in overruling the demurrer to the complaint on that ground. It is said in the brief of the learned counsel for the appellants that this so-called bill of particulars is, in effect, a complaint in itself because of its stating certain transactions therein set forth. But, if that be true, it can hardly be regarded as a bill of particulars at all, and should have been objected to in the court below for insufficiency, and a further and more perfect account demanded.

"A bill of particulars does not set forth the *cause* of action or the *ground* of defense; these constitute the function of the original pleading. * * * Another object of a bill of particulars is to prevent surprise on the trial, by furnishing that information which a reasonable man would require respecting the matters against which he is called upon to defend himself, and by thus limiting the generality of the pleading its effect is to confine the proof to the particulars specified therein." 3 Enc. Pl. & Prac., pp. 519, 520.

See, also, *Ferry v. King Co.*, 2 Wash. St. 337-343, 26 Pac. 537.

Under our statute a bill of particulars cannot be considered a pleading. Ballinger's Ann. Codes & St. §§ 4904, 4905. The plaintiff's cause of action must be stated in his complaint, and "the defendant may demur to the complaint when it shall appear upon the face thereof * * * (5) that several causes of action have been improperly united." Id. § 4907. It does not seem to be claimed by appellants that the complaint itself states more than one cause of action, but it is argued that as amplified by the bill of particulars it states two causes of action,—one upon a parol guaranty to pay the salary due plaintiff from the respondent corporation to June 7, 1899, and the other upon the joint obligation of the company and the appellants to pay the plaintiff the salary to become

due after said date, less the payments alleged to have been made. We think the demurrer was properly overruled. While a bill of particulars may be said to be a part of the plaintiff's complaint in the sense that it must relate to the complaint and be construed with reference to it, yet it cannot be considered as a part of the complaint for the purposes of the subsequent pleadings, but only to the extent of restricting the plaintiff's proof to the matters therein specified. In other words, the complaint cannot be enlarged or amended by a bill of particulars.

* * * * * * * * * * *

CHAPTER X.

AMENDMENT AND AIDER.

SECTION 1. APPLICATION FOR AMENDMENT.[1]

STEWART v. WINNER.

Supreme Court of Kansas. 1905.

71 Kansas, 448.

The opinion of the court was delivered by

MASON, J.: Martin Stewart filed a petition against the board of trustees of Park College, who attacked it by demurrer. The demurrer was sustained, whereupon the plaintiff brought proceedings in error in this court to review that ruling, no judgment having been rendered. The decision of the trial court was affirmed. *Stewart v. Park College,* 68 Kan. 465, 75 Pac. 491. Upon the mandate of affirmance being recorded, the plaintiff asked leave to file an amended petition. The court refused to grant it, and rendered judgment for the defendant. The plaintiff prosecutes error, and contends that under the statute (section 136, Cic. Code; section 4570, Gen. St. 1901) he had an absolute right to amend his petition at any time before the filing of an answer or the rendition of judgment, and that the action of the court was therefore error. Granting that this is true, it cannot avail the plaintiff. So far as the record shows, he did not in fact file an amended petition, or tender one for filing, and he in no way advised the court in what respect, or by what additions or alterations, he wished to amend his original pleading.

"To secure the reversal of a rule refusing to allow a party to amend his pleading, he must show affirmatively that the amendment proposed was material." *Byington v. Com'rs of Saline Co.,* 37 Kan. 654, 16 Pac. 1051.

The position of the plaintiff is not bettered by the fact

[1] *Affidavits.* "It would be better to have all statements of fact, upon which motions to amend shall be predicated, presented in affidavits, but such course is not indispensable." Millan v. Southern Ry. Co. (1898), 54 S. C. 485.

that if his view is correct he had a right to file his amended petition without permission. If the permission was unnecessary, it could hardly have been material error to refuse to grant it. In *Quinlan v. Danford,* 28 Kan. 507, an attachment was dissolved because the affidavit was insufficient and the petition failed to state a cause of action. The plaintiff asked leave to amend each of them, and, upon his request being refused, brought the case here. In the opinion it was said:

"From the record before us we cannot declare that any material error was committed by the refusal of the district judge to allow the amendments. There is no showing made in the record as to the character of the amendments requested, and therefore we cannot say whether the amendments would have been sufficient to cure the defects in the petition and affidavit, without leave of the judge, the plaintiffs had the right to amend their petition, as no answer had been filed. If they had made the amendment, and then the judge had ignored or refused to consider the petition as amended, the error would be material. If the record contained the proposed amendment to the affidavit, and it appeared from such amendment that the affidavit would be sufficient, the refusal of the judge to allow the amendment would also be material error. * * * Error is not to be presumed, but must be affirmatively shown, and we cannot say from this record that any material or substantial error was committed."

In the present case, the petition as it stood stated no cause of action; it was not in fact amended; no showing was presented that any amendment that could be made would be material; nothing, therefore, remained but for the court to render judgment for the defendant.

The judgment is affirmed. All the justices concurring.

PRATT, HURST AND COMPANY v. TAILER.

Appellate Division of the Supreme Court of New York. 1904.

99 New York Appellate Division, 236.

LAUGHLIN, J.: * * *

The amendment did not state a new cause of action, and was one which, in a proper case, should be granted. *Coyle v. Davidson,* 92 App. Div. 322. The moving papers, however, fail to excuse the failure or omission to allege these facts originally. The application is based upon the affidavit of said attorney in fact, and upon the original and proposed amended complaint and answer. The only facts stated in the affidavit having any bearing on the point now under consideration are that "the person in the office of the plaintiff who had charge of this case at its inception has since died," and that when the affiant called upon the attorneys to prepare the case for trial he "was advised that, according to the facts as now more fully known and stated," the complaint should be amended, setting forth "certain acts of negligence and breach of contract on the part of the defendant" not specifically alleged. This affidavit is insufficient, under the well-settled rule, which, as we have already stated, is that ordinarily a party will not be permitted to amend a pleading for the purpose of setting forth facts of which he had full knowledge at the time of interposing the original pleading, and that facts satisfactorily excusing the failure or neglect in not setting forth all the material facts in the original pleading must be shown. *Mutual Loan Association v. Lesser,* 81 App. Div. 138. In the case at bar neither is it shown that the new facts sought to be set up in the amended complaint were not known to the plaintiff or its attorney in fact, nor is any explanation given of the omission to allege them originally. The plaintiff, therefore, failed to present a case warranting the granting of the amendment.

It follows that the order should be reversed, with $10 costs and disbursements, and the motion denied, with $10 costs, but with liberty to renew on proper papers.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and HATCH, JJ., concurred.

ABBOTT v. MEINKEN.

Appellate Division of the Supreme Court of New York. 1900.

48 New York Appellate Division, 109.

INGRAHAM, J.: This action coming on for trial at part 3 of the special term,—a branch of the court for the trial of equity causes,—and the defendant having moved to amend his answer, it was ordered that the said motion be granted, and the defendant granted leave to amend his answer generally, including amended or additional counter-claims, upon condition that the defendant should pay certain costs. There were no facts stated to the court, so far as appears, to justify the court in exercising its discretion in allowing the service of an amended answer. The amended answer allowed substantially changes the defense, by allowing the defendant to amend the answer in such a way as the defendant deems proper, and to include amended or additional counter-claims. We think this is not such an amendment as the court had power to grant upon the trial. That power is regulated by section 732 of the code, which provides for allowing certain amendments by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting an allegation material to the case, or, "where the amendment does not change substantially the claim or defense, by conforming the pleading or other proceeding to the facts proved." This amendment is not within any of the provisions of this section. So far as appears, there were no facts proved, but the amendment substantially changed the defense.

* * * * * * * * * * *

We also think the court below erred in granting an unlimited power to amend, without the service of the proposed amended pleading at the time the application was made. In the exercise of the discretion of the court allowing an amendment, it is quite necessary that the court should have before it the amended pleading, so that it can be clearly ascertained whether or not an amendment should be allowed.

We think, therefore, the order appealed from should be reversed, with $10 costs and disbursements.[1]

VAN BRUNT, P. J., PATTERSON, O'BRIEN, and MCLAUGHLIN, JJ., concurred.

[1] VARIANCES AND AMENDMENTS.

The following provisions as to variances and amendments are found in most of the Codes.

1. *Variance.* "No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proven to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just."

2. *Amendment on Immaterial Variance.* "When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs."

3. *Failure of Proof.* "When, however, the allegations of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof."

4. *Amendments as of Course.* "Any pleading may be once amended by the party of course, without costs and without prejudice to the proceedings already had, at any time before the period for answering it shall expire."

5. *Amendment or Pleading over after Demurrer.* "After the decision upon a demurrer if it be overruled, and it appears that such demurrer was interposed in good faith, the court may, in its discretion, allow the party to plead over upon such terms as may be proper. If the demurrer be sustained the court may, in its discretion, allow the party to amend the pleading demurred to upon such terms as may be proper."

6. *Amendments in Furtherance of Justice.* "The court may, at any time before trial, in furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended by adding the name of a party, or other allegation material to the cause, and in like manner and for like reasons, it may, at any time before the cause is submitted, allow such pleading or proceeding to be amended, by striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or when the amendment does not substantially change the cause of action or defense by conforming the pleading or proceeding to the facts proved."

7. *Errors Disregarded.* "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party."

Other provisions respecting amendments appear here and there in the codes, and some of the above provisions are occasionally lacking in whole or in part, or are found in a different form, but the variations are not of sufficient importance to require quotation or reference to the particular statutes.

SECTION 2. DILIGENCE OF PARTY SEEKING AMENDMENT.

PAULSEN v. MODERN WOODMEN OF AMERICA.

Supreme Court of North Dakota. 1911.

21 North Dakota, 235.

FISK, J.: This is an appeal from a judgment of the district court of Cass county. The action was brought to recover the sum of $2,000 and interest, claimed to be due plaintiff under a beneficiary certificate issued by defendant to one Soren Peter Paulsen in due form, in the year 1906, and at the time of the death of said Paulsen, which took place on May 16, 1907, the plaintiff was the beneficiary named in such certificate. * * *

* * * * * * * * * * *

It will thus be seen that the sole issue was whether the insured committed suicide. * * *

* * * * * * * * * * *

Appellant's first two assignments of error may be considered together, as they relate to the rulings of the court in denying leave to amend the answer and continue the case over the term. We are entirely clear that those assignments are without merit. Concededly, a continuance was necessary, but only necessary in the event an amendment to the answer as prayed for was permitted. The proposed amendment would introduce a wholly new defense. The motion was not made until about the time the case was called for trial. Furthermore, no sufficient excuse was offered for its failure to plead such new defense in its original answer, or for its delay in moving to amend after acquiring knowledge of the facts constituting its alleged new defense. The affidavit on which such motion was based reveals the fact of such knowledge on defendant's part for at least several months before the trial. Diligence in making such motion was essential, and the apparent lack of such diligence, together with the want of any valid excuse therefor, was alone sufficient to warrant the ruling complained of. The contention that such delay was excused by the conduct of plaintiff's counsel is not tenable. The utmost that can properly be claimed is that

the letter written by plaintiff's attorney furnished a valid excuse for a portion of such delay. Moreover, a conclusive answer to appellant's contention is the fact that the affidavit used as a basis for the motion, in so far as it purports to set forth facts in support of the additional defense of fraud and breach of warranty, is upon information and belief merely, without any attempt to state the sources of such information or belief; nor is it shown with any degree of certainty that the depositions of the witnesses, if taken, would prove or tend to prove the new defense sought to be pleaded. In the light of such showing we decline to hold that the trial court abused the discretion vested in it in such cases. It is firmly settled that such discretion is very broad and its exercise will not be interfered with, except in a clear case of an abuse thereof.

* * * * * * * * * * *

HEIDEN v. ATLANTIC COAST LINE RAILROAD COMPANY.

Supreme Court of South Carolina. 1909.

84 South Carolina, 117.

November 1, 1909. The opinion of the court was delivered by

Mr. Justice HYDRICK: On February 8, 1907, plaintiff became a passenger on the defendant's railroad from Manning to Sumter, and delivered to defendant, at Manning, her trunk, and received a check therefor. Some time thereafter she demanded the trunk, but defendant failed to deliver it. She sued for the value of the trunk and its contents. The answer was a general denial. Before the trial defendant moved for leave to amend its answer by setting up the relation of warehouseman to the trunk, and alleging that it was destroyed by fire in its station at Sumter, without fault on its part. The motion was granted on terms, to wit, the payment of $12 costs to plaintiff. The defendant did not avail itself of the leave granted to amend, and went to trial on its general denial. At the trial the defendant introduced testimony, without objection, tend-

ing to show that the trunk was destroyed by fire on February 24th, at its station in Sumter, without fault on its part, after it had remained there, uncalled for, since February 8th. At the conclusion of the testimony, * * * defendant's attorney moved for leave to amend the answer to conform to the facts proved. His honor refused the motion in a written order, in which he stated that, defendant having failed to avail itself of the privilege granted to amend on terms, the moton did not appeal strongly to his discretion. The defendant's attorney contended: (1) That the testimony was admissible, under the general denial; and (2) that, having been introduced without objection, the defendant had a right to the benefit of it. Both contentions were overruled. The verdict and judgment was for plaintiff, and defendant appealed.

* * * * * * * * * *

The next question is, did his honor err in refusing defendant's motion to amend the answer to conform to the facts proved? Section 194 of the Code of Civil Procedure of 1902 provides that such an amendment may be allowed, "when the amendment does not change substantially the claim or defense." It cannot be seriously contended that the amendment asked for would not have materially changed the defense. In fact it would have been an entirely new defense.

In *Derry v. Holman*, 27 S. C. 621, 2 S. E. 841, the defendant interposed a general denial to an action on a note. At the close of the testimony he offered to prove failure of consideration. The court ruled that he could not do so under the general denial. He then moved to amend his answer, setting up that defense. The motion was refused, the judge saying: "If you had made this motion at the first calling of the docket, or even this morning, stating the reason why, or indicated that you were disabled, I would have seen my way clear to have indulged it; but now, after the case has gone to the jury, it seems to me, on the spur of the moment, I should have no hesitation at all." Held, no error. In this case the defendant had been given leave to amend its answer before the trial was entered upon. It deliberately declined to avail itself of the privilege, and we think his honor was right in refusing its motion at that stage of the case, and under those circumstances. Moreover, this court has frequently held that the amendments

provided for in section 194 of the Code of Civil Procedure of 1902 are, by the terms of that section, within the discretion of the circuit judge, and that it will not interfere, unless it is made to appear that the discretion has been abused.

* * * * * * * * * * *

HOME INSURANCE COMPANY OF NEW YORK v. OVERTURF.

Appellate Court of Indiana. 1904.

35 Indiana Appellate, 361.

WILEY, J. Appellee brought this action against appellant to recover for a loss by fire on an insurance policy issued by appellant to him. The complaint is in one paragraph. Appellant filed an answer in nine paragraphs, the first of which was a general denial. A demurrer was addressed to each of the second, third, fourth, fifth, sixth, seventh, eighth, and ninth paragraphs of answer, and was sustained to all of them except the seventh and eighth. The case was submitted to a jury for trial, and before the conclusion thereof appellant moved the court for leave to file a tenth paragraph of answer, and supported the motion by affidavit. The court overruled the motion and refused to allow appellant to file such answer. * * *

* * * * * * * * * * *

In the tenth paragraph of answer, which the trial court refused to permit appellant to file, it is averred that the policy sued on was issued upon the written application of the appellee, in which he made certain specific statements. It is then averred that in said application he was asked and answered the following question: "Is there any additional insurance upon the property in this or other companies?" To which he answered: "Yes; Indiana." * * *

The answer averred that at the time of the issuing of the policy sued on appellant had no notice or knowledge of said additional insurance in the Hopewell Fire Insurance Company in the sum of $300 upon the same personal property embraced within appellant's contract.

* * * * * * * * * * *

* * * The answer thus shows an express violation of a valid provision of the policy. * * *

As to whether the answer was timely tendered, a more difficult question is presented. By the many decisions in this state as to the right to amend pleadings, it is almost exiomatic that such right rests largely within the discretion of the trial court, and that, unless it appears that such discretion has been abused, the action of the trial court will not be reviewed on appeal. If the rights of a litigant have been abridged by an adverse ruling on his offer to amend his pleadings, or to file additional paragraphs thereof, and he has been without fault, and has brought himself within the letter and spirit of the statute, and the refusal of the court to allow such amendment has resulted in the miscarriage of justice, then it would seem that such refusal would be an abuse of judicial discretion.

Appellee asserts that the offer to file the tenth paragraph was not timely made, because the affidavit in support thereof shows that the facts set up therein came to appellant's knowledge during the progress of the trial on the 22d day of May, 1903, and the offer to file the answer was not made until the day following at the noon hour. There is some confusion in the dates as disclosed by the record, but it is conceded by appellant that the offer to file the tenth paragraph of answer was not made until the noon hour on May 23d. The affidavit in support of the answer discloses that appellee failed to divulge the fact that, at the time the policy sued on was issued, he had another policy of $300 in another insurance company upon part of the same property covered by appellant's policy. He concealed this fact, not only in his application for insurance and in his proofs of loss, but also in his examination under the statute before the trial. * * *

The fact that appellee had this $300 policy never came to the knowledge of the appellant until about the noon hour on the day when the offer to file the additional paragraph was made. This fact was divulged through the testimony of the appellee himself during the progress of the trial. Upon these facts, can it be said that appellant used ordinary diligence in presenting the answer?

We must not lose sight of the fact that the trial of this cause was in progress. During the sittings of the court, from the time appellant learned of the additional insurance

to the very moment the answer was tendered, witnesses were being examined. The answer is of considerable length and necessarily required much time to prepare it. Additional time was required to prepare the affidavit in support of it. During the progress of a trial multifarious duties devolve upon counsel, and in determining whether due diligence has been used, as applied to the facts disclosed in each particular case, we conceive it to be the duty of the court to take into consideration all the facts and the duties which devolve upon counsel. Appellant could not have filed its tenth paragraph of answer until it came into possession of the facts relied upon. It certainly used every means at its command to acquaint itself of facts upon which to rest its defense. Appellee had ample opportunity to disclose the fact to appellant upon which the tenth paragraph of answer was based, yet he studiously kept that fact securely locked within his own breast. It is clear that no additional evidence would have been required upon the issue tendered by the answer, for the evidence was already in.

* * * * * * * * * * *

Speaking of the discretionary power of the court to permit amendments to pleadings, the Supreme Court, in *Chicago, etc., Ry. Co. v. Jones,* 103 Ind., at page 389, said: "But the decision of the nisi prius court, when cause is shown, is not conclusive. It may be reviewed in this court, and will be disapproved when substantial injustice appears to have been done"—citing Works' Prac. § 700; *Burr v. Mendenhall,* 49 Ind. 496; *Shropshire v. Kennedy,* 84 Ind. 111. Without reciting the facts, the judgment in the case from which we have just quoted was reversed, because of the refusal of the trial court to permit appellant to amend its pleading.

Considering the entire record, we have reached the conclusion that "substantial injustice appears to have been done" by the refusal of the trial court to permit appellant to file its tenth paragraph of answer.

* * * * * * * * * * *

The judgment is reversed, and the trial court is directed to sustain appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

SECTION 3. SHOWING OF PREJUDICE BY PARTY OPPOSING AMENDMENT.

BOWERS v. GOOD.

Supreme Court of Washington. 1909.

52 Washington, 384.

FULLERTON, J.: * * *

It is first assigned that the court erred in permitting the amended answer to be filed on the day the cause was set for trial. It is said that the answer introduced a new issue in the case, one upon which the plaintiffs did not come prepared to try, and that the affirmative matter in the answer was inconsistent with the denials. But we do not think either of the objections is well taken. The statutes permitting amendments to pleadings were enacted in the furtherance of justice, and under them amendments are properly allowed at any stage of the case, when to allow them will not operate to the prejudice of the opposing party. The fact that the amendment may introduce a new issue is not alone ground for denying it. The true test is found in the answer to the question, Is the opposing party prepared to meet the new issue? His remedy, therefore, when a new issue is sought to be presented by an amendment, is not to object to it merely, but to show in addition that he is unprepared to meet the new issue. In such a case the trial court will in its discretion either continue the case in order to allow him to prepare for trial of the new issue or deny the right to amend. This question was presented in the case of *Daly v. Everett Pulp & Paper Co.*, 31 Wash. 252, 71 Pac. 1014, where the court said:

"This court has heretofore construed the statute as intending much liberality in the matter of amendments in furtherance of justice. In *Barnes v. Packwood*, 10 Wash. 50, 38 Pac. 857, three amended answers had already been filed, and at the time of the trial the court permitted a fourth to be filed. The court observed at page 52 of 10 Wash., page 858 of 38 Pac., as follows: '* * * The court having such a large discretion under our law and practice in matters of amendments, we do not think we

would be justified in reversing the case for this reason.' The record does not disclose any claim on the part of appellant that he was really injured by the amendment, and unprepared with testimony to meet any issue tendered thereby. No application for continuance of the trial on the ground of surprise or inability to produce testimony is shown. If such had been made to appear, no doubt the trial court would have granted the amendment upon such terms as would have fully protected any rights shown to be jeopardized by permitting the amendment at that time. We think reversible error is not shown permitting the amended answer to be filed." * * *

* * * * * * * * * * *

SECTION 4. CHARACTER OF AMENDMENT ALLOWED.

(a) Before Trial.

BROWN v. LEIGH.

Court of Appeals of New York. 1872.

49 New York, 78.

The original complaint was to compel the determination of conflicting claims to real property. Within the time prescribed by section 172 of the code, plaintiff served an amended complaint which set forth a cause of action in ejectment. This was stricken out on motion, upon the ground that the cause of action embraced therein was a new and different one from that set forth in the original.

GROVER, J.: * * * The question arising upon this appeal is whether, under section 172 of the code, a plaintiff is authorized to amend his complaint by setting forth a new cause of action, and if so, whether the right is restricted to setting forth one of the same class as that contained in the original complaint. That section provides that any pleading may once be amended by the party, of course, without costs, and without prejudice to the proceedings already had within the time therein specified. Although the construction of this section has been much discussed, it has not been determined by this court in

respect to the questions involved in the present case, and the decisions by the other courts are somewhat conflicting. In some cases it has been held that the true construction was that this section gave only the right to amend and perfect what was previously set out in an imperfect manner. That setting up a new cause of action, or new defense, was in no proper sense an amendment, but substituting a new pleading. *Hollister v. Livingston* (9 How. Pr. Rep. 146); *Field v. Morse* (8 id. 47); *Dows v. Green* (3 id. 377) are cases of this class. In other cases (*Mason v. Whitely*, 4 Deur, 611; *Prindle v. Aldrich*, 13 How. Pr. 466; *Troy and Boston R. R. Co. v. Tibbits*, 11 id. 168, and others), it has been held that a new cause of action or defense might be set up. I think the construction adopted in the former cases too strict, and subversive of the true meaning of the section in this respect. That gives a party power to amend any pleading once without imposing any restriction upon it. The term pleading includes all the ment of the plaintiff's cause or causes of action. It is this statement or complaint that may be amended and perfected by the party so as to enable him to present his entire case upon trial. It is not confined to an amendment of such matter as has been defectively stated in the original complaint. The same remarks apply to the answer. This is a statement of the defense and of any counter-claim or claims. It is this statement that may be amended by the party so as to enable him to avail himself of all his defenses upon trial. It follows that new causes of action may be included in the complaint and those in the original left out, and new defenses or counter-claims embraced in the answer. That this was the intention of the legislature clearly appears from the last clause of section 173, by which the power of the court to grant amendments upon the trial, by conforming the pleading to the facts proved, is restricted to such amendments as do not change substantially the claim or defense. The insertion of the restriction shows that the legislature, in its absence, understood that such change might be made under the power conferred. There is no such restriction in section 172, nor upon the general power conferred upon the court to allow amendments conferred by section 173. Were the power to amend upon trial unrestricted, parties might be compelled to litigate matters of which they had no notice,

and for which they were unprepared, and injustice thereby done, but there is no such danger where the amendment is made before trial, so that the adverse party may come fully prepared to meet. It is insisted by the counsel for the respondent that although under section 172 a new cause of action may be set forth in the complaint, yet that this can only be done when such new cause belongs to the same class as those contained in the original complaint. Section 167 of the code declares what causes of action may be joined, and creates for this purpose seven classes and declares that all causes of action belonging to any one of these may be joined. Section 144, code, provides that where causes of action are improperly joined the defendant may demur to the complaint. It follows that a plaintiff cannot in an amended complaint add a cause of action belonging to a different class from those in the original, retaining the latter. This would render the amended complaint demurrable under section 144, as the amended complaint, when properly served, is regarded as the complaint in the action, the same as if the only one that had been served. This explains the expressions in the opinions relied upon by the counsel for the respondent, that the new cause of action added must be of the same class. But when the causes of action in the original complaint are abandoned this reason no longer applies, it being requisite only that the causes of action in the amended complaint should all belong to the same class. There is no other reason for restricting the causes that may be added. The causes of action in the amended complaint must, like those in the original, be warranted by the summons. If that demands a specific sum of money, they must all be of the class where such a summons was proper, otherwise they may be stricken out upon motion. My conclusion is, that when the right to amend the pleading is given by section 172, the party may make the same as advised, the same as he could the original. This leads to a reversal of the orders of the general and special term, and to a denial of the motion to strike out the amended complaint.

All concur.

Ordered accordingly.[1]

[1] *Accord:* Murphy v. Plankinton Bank (1904), 18 S. D. 317; Hall v. Woodward (1888), 30 S. C. 564; McDaniel v. Monroe (1901), 63 S. C. 307.

(b) At the Trial.

GATES v. PAUL.

Supreme Court of Wisconsin. 1903.

117 Wisconsin, 170.

The cause of action set forth in the complaint at the outset was for the dissolution of a partnership and an accounting. The substance thereof was as follows: January 1, 1895, plaintiff and defendant made an agreement, partly verbal and partly written, for the purpose of buying timber lands of various sorts and dealing in the same in the states of Florida and Georgia. * * * Lands described in the lists attached to the complaint and referred to as A, B, and D, and other lands not necessary to mention, were acquired under said agreemnt, the title thereto being vested in the defendant. * * * The complaint closed with the usual prayer for relief in a winding-up suit respecting partnership dealings in lands where the title is vested in one of the parties.

After the evidence was all in the complaint was amended against objection of defendant, by adding after the allegations respecting the A lands the following:

"And plaintiff alleges as to said last-mentioned tract of land, that the title thereto was procured and caused to be conveyed to said defendant by this plaintiff upon an agreement in writing that said defendant should pay a specific sum, to wit: fifty-seven thousand four hundred ninety-eight ($57,498.00) dollars for five-sixths thereof, the remaining one-sixth of the consideration to be paid and supplied by this plaintiff, and that this plaintiff was to have and retain one-sixth (1/6) interest in said land; and the plaintiff did pay for and supply one-sixth of the consideration."

* * * * * * * * * * *

MARSHALL, J.: Counsel for appellant insist that the court erred in allowing the amendment to the complaint. The scope thereof, as intended by respondent's counsel, as understood by counsel for appellant, and as viewed by the court as well, was intended to change the cause of

complaint by eliminating therefrom the element of partnership without changing the scope of the controversy set out as regards the pecuniary results sought, so as to warrant relief in that regard upon the theory that an express trust in lands was created respecting the property involved in the suit, instead of a partnership with an incidental trust in lands. The cause of action in the broad sense of the term was not intended to be and was not in fact changed, either as regards form or the general scope of the controversy involved, other than the elimination therefrom of the partnership element. It was in equity originally and remained so notwithstanding the amendment. That neither worked a change in the form of the action as regards whether legal or equitable, nor materially changed the nature of the recovery necessary to vindicate the plaintiff's rights. At first, under a certain state of facts, respondent sought to recover as a wronged partner a specified interest in property, and to terminate his relations to the defendant in respect thereto. In the end he sought to obtain the same relief as regards property rights and to close up the identical subject-matter of controversy which led to the litigation and was the sole ground thereof, by substituting as the primary purpose of the suit the establishment of the relations of trustee and cestui que trust between him and appellant, and the winding up of such relations, for that of partnership relations and the winding up thereof. The result was to drop out the primary matter, the subject of establishing a partnership contract and a dissolution thereof, and substitute in its place the establishment of a trust in land and a termination of the trust. In either case the situation of the real estate and a recovery of an interest therein by the plaintiff was the real substance of the controversy.

It is insisted that the amendment worked a change in the plaintiff's claim, contrary to the statute governing the matter. We might, as it seems, decide the point involved by citing the single case recently decided by this court, of *Post v. Campbell,* 110 Wis. 378, 85 N. W. 1032, but inasmuch as counsel have argued with great confidence, apparently, that the trial court exceeded its power by granting the amendment and that such case does not govern the matter, we will examine the subject at some length.

Counsel rely upon decisions of the courts of New York, the identity of our code on the subject of the amendment of pleadings with that of New York, and some recognition in our reports that the scope of the statute as early understood in the latter state should be held to be its scope here. Starting with such premises, several cases are brought to our attention to show that it is not understood in New York that a complaint can properly be changed by amendment from one to wind up a partnership to one for relief not involving a partnership agreement. In our judgment, such cases, instead of supporting counsel's contention, when rightly understood are the other way. Without taking time to refer to them in detail, we will say that not one of them holds that it is not within the power of a trial court to allow a complaint to be amended so as to recover upon a different cause of action than the one originally sued on, if it is within the scope of the controversy which the pleader had in mind at the outset. Want of power is one thing; improper administration of power is quite another. It is not infrequent that counsel err by referring to cases where leave to amend was denied in the due administration of power, as authority supporting a contention of want of power. It must be kept in mind that what is challenged here is want of power. Cases holding that a recovery is improper if no amendment is made to cure the defective pleading, and cases where an amendment was applied for and disallowed and it was held on appeal that the disallowance was proper though judicial power existed to allow or disallow the same, have no place in our discussion. The fact is that the courts of New York give the power of amendment of pleadings under the code a much broader scope than is given thereto here, and so do most code states having provisions on the subject similar to our own. A few examples from New York will suffice at this point to emphasize what we have said.

In *Truesdell v. Bourke,* 145 N. Y. 612, 40 N. E. 83, cited by counsel, the action was one sounding in tort. A recovery was allowed in the lower court on contract. On appeal that was held error, but because the complaint was not amended in the court below. It was by no means held or suggested that the trial court could not have permitted an amendment if an application therefor had been made,

and then have granted judgment. Such an amendment would not be allowable in this state, because of the effect thereof to change the cause of action from one sounding in tort to one on contract. Not so, however, in New York. The court said: "This action is based upon fraud, and the plaintiff, before he can recover, must prove the complaint or substitute another in its place." That is readily understood when we keep in view that the court may, in New York, in a proper case, allow such substitution.

Counsel cite *Freeman v. Grant,* 132 N. Y. 22, 30 N. E. 247. An examination of that discloses plainly that the court recognized judicial power even upon the trial of an action to allow an amendment entirely changing the cause of action as to form. "That may not ordinarily be done on the trial against the objection of the other party," said the court.

In *Brown v. Leigh,* 49 N. Y. 78, power to change the whole form of the action was distinctly held.

* * * * * * * * * * *

In *Hopf v. United States Baking Co.* (Super. Buff.) 21 N. Y. Supp. 589, a recent case, the subject of the power of the court to grant amendments to pleadings, as understood in New York, will be found discussed at much length, the conclusion reached being that it may be exercised in a proper case to the extent of changing entirely the cause of action, so long as the real controversy between the parties is not wholly departed from; that with such limitation a cause of action in equity may be changed to one at law, and one sounding in tort changed to one on contract.

In a late work on code pleading, by Hepburn, at section 306, notice is taken of the fact that in this state, unlike New York and most code states, the limitation of power to allow amendments of complaints is to stop at such as change the cause of action as to form. It is argued that by the true spirit of the code any amendment which the court may deem to be in furtherance of justice may be allowed, so long as it does not depart from the identity of the transaction constituting the cause of complaint and the rights of the adverse party be guarded, by the manner in which the power is administered, from being substantially prejudiced. The doctrine maintained here, that the limitation named in the statute precludes changing the mere form of the remedy, is suggested to be out of

harmony with the prevailing doctrine, and to be a relic of the old regime which existed prior to the code; that it is attributable to the disinclination of lawyers versed in the technicalities of the old system of practice to conform to the true spirit of the code. In a general summing up of the subject at page 266 he says, in regard to the disinclination referred to:

"It appears to be responsible for the doctrine, still echoed here and there in code states by text-writers and courts, that 'an action upon a contract cannot be changed to one in tort, or from tort to contract,' and for the doctrine that an amendment changing a legal to an equitable cause of action cannot be made, either as of course or by leave, 'not even when the facts stated would sustain either action.'

"But these relics of the older theory are not so common as to affect very seriously the truth of the proposition that the restriction imposed by the codes in forbidding an amendment which would 'change substantially the claim or defense' does not refer to the form of the remedy, but to the general identity of the transaction constituting the cause of complaint."

In the note to sustain the suggestion respecting adherence to relics of the old theory, he cites only cases from this state, while he cites freely from those of New York to support the broader doctrine that the power of the court is ample to allow an amendment changing entirely the form of the action, so long as the general subject of the litigation is not departed from.

* * * * * * * * * *

The only limitation of judicial power under section 2830, Id., as to allowing a complaint to be amended, is that the "claim" of the plaintiff shall not be substantially changed, and sound judicial discretion in the matter shall not be overstepped. The bearing of such limitation upon changing the cause of action within the scope of the claim has been too long settled here to be now opened for serious discussion. It may be that it was a mistake to hold, as this court did, very early after the code was adopted here, that a change in the form of the action is a substantial change in the claim within the meaning of the statute. *Carmichael v. Argard,* 52 Wis. 607, 9 N. W. 470. Certainly, that is out of harmony with New York, the home

of our code, as we have seen. But it is too late to change the practice now. It seems clear, however, that if the framers of the code had intended that, in a general sense a complaint should not be amended under section 2830 changing the cause of action therein, language would have been used to that effect, instead of language merely preventing the court from allowing the plaintiff, by amending his pleading, to go substantially outside the scope of his claim disclosed in such pleading. In most cases a change of the form of an action within the scope of the controversy set forth in the complaint would violate the law as to the binding effect of a choice of remedies, and that may have had some effect in shaping the judicial policy of this court that such a change is within the inhibition of the statute. In any event, subject to the one limitation mentioned in *Carmichael v. Argard,* in harmony with the practice in New York, the power of amendment as to a complaint under section 2830 within the scope of the claim disclosed in the pleading is without any limit except that of judicial discretion. *Fischer v. Laack*, 76 Wis.. 313, 45 N. W. 104; *Post v. Campbell,* 110 Wis. 378, 85 N. W. 1032. Notwithstanding this court, by adhering to the view indicated, has subjected itself to criticism by text-writers as giving less heed to the real purpose of the code to enable parties to end their litigation speedily regardless of mere technicalities and mistakes that do not substantially vary the course of justice as regards the right of the matter at the end than is given elsewhere (Bliss on Code Pl., § 429; Pom. Code Rem., § 566; Hepburn, Development of Code Pl., § 306), it is believed that the broad scope here given to the statutes on the subject, as a whole, leaves little ground for just criticism.

Applying what has been said to the situation before us, it seems clear that there was ample authority in the circuit court to allow the amendment complained of. It did not require any new evidence. All the facts were before the court, so far as we can see. If, after the amendment, counsel for appellant considered further evidence was thereby rendered necessary, there was ample opportunity to apply to the trial court for protection in that regard.

* * * * * * * * * * *

SCROGGIN v. JOHNSTON.

Supreme Court of Nebraska. 1895.

45 Nebraska, 714.

NORVAL, C. J.: * * * The first argument is directed to the ruling of the trial court in permitting the plaintiff below, after the evidence had been all taken, to file an amended or supplemental petition, whereby the form of the action was changed from a suit at law to a purely equitable action. It is true, the suit, as originally brought, was in ejectment, to recover the possession of land, and that such an amendment of the proceedings was allowed as to change the form of the action to that of foreclosure of a land contract upon the same premises, yet a reversal ought not to be ordered in consequence thereof. This court has decided that the permitting of an amendment of a petition which changes the form of the action is of no consequence so long as the identity of the cause of action remains. *Roberts v. Swearingen,* 8 Neb. 363; *McKeighan v. Hopkins,* 19 Neb. 33; *Bank v. Bollong,* 28 Neb. 684; *Homan v. Hellman,* 35 Neb. 414. In the case last cited, which was an action to quiet title to real estate, the petition was amended to state a cause of action in ejectment to recover the same premises, and such amendment was held not to be erroneous. The case reported in 19 Neb. was a suit in ejectment, and the court permitted an amendment to make the action one to redeem. In *Robinson v. Willoughby,* 67 N. C. 84, the plaintiff was permitted to amend his complaint, changing the form of the action from ejectment to that of foreclosure of a mortgage. * * *

We fail to discover any abuse of discretion in permitting the amended pleading to be filed.

* * * * * * * * * * *

THOMAS v. HATCH.

Supreme Court of Wisconsin. 1881.

53 Wisconsin, 296.

Action for services rendered by the plaintiff to the defendant as a farm hand from May 3 to July 3, 1880, at $20 per month. The complaint alleges a special contract for the work at the above price per month, but for no specified time, and that the plaintiff left the service of the defendant by reason of sickness and inabiltiy to work. * * * On the trial in the county court the jury found specially * * * that the contract was made on Sunday; that the value of plaintiff's services was $20 per month; * * * After verdict the court permitted the plaintiff to amend his complaint by alleging therein that the contract was made on Sunday, and that plaintiff's services to the defendant were worth $40. The court, therefore, rendered judgment for the plaintiff on the special verdict for $40 damages, besides costs. The defendant appeals from the judgment.

LYON, J. We think the record fails to disclose any error. The jury found that the contract of hiring mentioned in the pleadings was made on Sunday. It was therefore void, and on proper pleadings the plaintiff would be entitled to recover for his services *quantum meruit*. The court allowed the complaint to be amended after verdict to agree with the proofs. It was clearly within the discretion of the court to permit the amendment. Rev. St. 756, § 2830. It does not change the claim substantially, for it still remains a claim for two months' services. It only goes to the rule of compensation therefor. * * *

GUIDERY v. GREEN.

Supreme Court of California. 1892.

95 California, 630.

HARRISON, J. The plaintiff's interstate, one Frost, brought this action to obtain certain specific relief for an alleged violation of a written agreement entered into between him and the defendant, January 12, 1885. The defendant set up as one of his defenses to the action that the agreement set out in the complaint had been superseded and annulled by a subsequent written agreement, executed in March, 1885, by the plaintiff and one Threlfall on the one part, and the defendant on the other. Upon the trial of the cause the defendant, after having proved the execution of the subsequent written agreement, sought to show that it had been executed upon the consideration and agreement between the parties thereto, that the agreement of January 12, 1885, should be canceled and all claims of the plaintiff against the defendant thereunder waived. The plaintiff objected to this testimony on the ground that it was an attempt by parol evidence to vary and contradict the terms of a written instrument, and also that it was not responsive to any issues made by the pleadings. The court having sustained this objection, the defendant then presented certain amendments to his answer in order to obviate the objection that the evidence was not within the issues, which he asked leave to file. To this the plaintiff objected upon the ground "that it is too late; that it is unconscionable; that it is taking us by surprise; and that it shows gross negligence on their part in not asking to amend before,"—which objections were sustained by the court.

If the defendant could establish the facts presented by these amendments to his answer, they would constitute a defense to the plaintiff's demand (*Bank v. Stover,* 60 Cal. 387); and for that reason, if for no other, the court should have allowed the amendments (*Stringer v. Davis,* 30 Cal. 321). If by reason of such amendments the court was satisfied that the plaintiff was taken by surprise, and required further time in which to make suitable preparations for meeting such defense, it could have continued the case or

postponed the further hearing until the plaintiff should have reasonable time to make such preparation, and at the same time would impose upon the defendant such terms as would compensate the plaintiff for the expense and delay caused thereby. It can very rarely happen that a court will be justified in refusing a party leave to amend his pleading so that he may properly present his case, and obviate any objection that the facts which constitute his cause of action or his defense are not embraced within the issues, or properly presented by his pleading. This rule is especially cogent when the objection to testimony is not that it is then for the first time brought to the notice of the adversary, but that by reason of the language of the pleading it is not within the terms of the issue. The fact sought to be shown by the testimony offered on the part of the defendant was not a defense, then, for the first time presented in the case. The defendant had attempted to set it up as a defense in his original answer, but, by reason of certain phraseology used therein, the court held, upon the objection of the plaintiff, that it did not present an issue that would render the testimony admissible, and, when the defendant asked leave to amend his answer so as to obviate this ruling, the court should have granted his motion.

* * * * * * * * * * *

The order is reversed.[1]

PATERSON, J., and GAROUTTE, J., concurred.

[1] "It seems to be the opinion of many trial judges that amendments should seldom be allowed pending the trial. Why not in all proper cases? The object of the trial is to settle and dispose of the issues, and all matters connected with the case, in one action. . . . The rule has often been stated here, that during the trial, the court, in furtherance of justice, should allow amendments liberally, in order to mould and direct its proceedings, so as to dispose of cases upon their substantial merits and without unreasonable delay, regarding mere technicalities as obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial right." McDonald v. Hulet (1901), 132 Cal. 154.

FLAHERTY v. BUTTE ELECTRIC RAILWAY COMPANY.

Supreme Court of Montana. 1911.

43 Montana, 141.

Mr. Justice HOLLOWAY delivered the opinion of the court:

A statement of the facts of this case will be found in the opinion upon the former appeal. *Flaherty v. Butte Electric Ry. Co.*, 40 Mont. 454, 107 Pac. 416, 135 Am. St. Rep. 630. Upon the return of the cause to the district court, plaintiff amended his complaint, and the issues being joined a trial was had, which resulted in a verdict and judgment in his favor for $25,000. Defendants have appealed from the judgment and from an order denying them a new trial.

1. The complaint as originally drawn charged negligence in the operation of the car which resulted in the injury, particularly in that Le Sage, the motorman at the time, failed to turn off the electric current, apply the brakes, and stop the car before striking the child. Upon the former appeal we held that the evidence failed to prove the specific act of negligence thus pleaded. The amendment made to the complaint consists in substituting for the allegation of the specific act of negligence in failing to apply the brakes, etc., an allegation that Le Sage failed to keep any vigilant or proper lookout, whereby he might have seen the child and avoided the injury. It is now insisted that the so-called amendment was in fact the substitution of a different cause of action.

There cannot be any question as to the general rule of law applicable in such cases. In *Leggat v. Palmer*, 39 Mont. 302, 102 Pac. 327, this court said: "Under the statute, to allow amendments is the rule; to deny them is the exception. The rule observed by this court has always been to allow them with great liberality, where they do not change the nature of the action, or mislead the adversary to his prejudice; its application going even to the extent of permitting them after verdict and judgment." The only difficulty arises in applying the rule to the facts of the particular case. "To constitute a cause of action for a tort, then, the plaintiff's right must have been infringed by the

wrongful act of the defendant, with the result that plaintiff suffered damages." *Dillon v. Great Northern Ry. Co.*, 38 Mont. 485, 100 Pac. 960. It is alleged in the original and also in the amended complaints that the negligence of the defendants in operating the car caused the injury. May the plaintiff, then, substitute as the charging part of his complaint one specific act of negligence for another, without introducing a different cause of action?

In *Kerr v. Grand Forks*, 15 N. D. 294, 107 N. W. 197, the original complaint charged that the injury resulted from negligence of the city in permitting a sidewalk to be constructed in a dangerous manner. The amendment charged that the negligence consisted in permitting the sidewalk to remain in a dangerous condition after the city had notice. It was held that this amendment was properly allowed.

In *Peery v. Quincy*, O. & K. C. R. Co., 122 Mo. App. 177, 99 S. W. 14, the original complaint charged that the negligence consisted in failing to keep a fence in repair. The amendment charged negligence in maintaining a defective gate. The allowance of this amendment was held proper.

In *Chapman v. Nobleboro*, 76 Me. 427, the pleading is not set forth, but in disposing of the objection to the amendment the court said: "The first of the amendments is, not a change in, but an addition to, the description of the alleged defect in the way, and the second relates to the manner in which the accident happened, leaving the accident itself and the result of it the same. There is therefore no change in the cause of action, either in the alleged defect or the result of it, and the allowance of the amendments was within the discretion of the presiding justice."

In *Davis v. Hill*, 41 N. H. 329, the original declaration charged negligence in permitting a roadway to be uneven and incumbered with snow and ice, by reason whereof the injury resulted. The amendment charged negligence in failing to maintain a railing or barrier along the road, by reason of which the injury resulted. It was held that this amendment was properly allowed.

In *Montgomery Traction Co. v. Fitzpatrick*, 149 Ala. 511, 43 South. 136, 9 L. R. A. (N. S.) 851, the original complaint charged that plaintiff was wrongfully ejected from a street car on the Court street line by the conductor of the car. The amendment charged that the conductor on the Electric Park line negligently tore and mutilated plaintiff's trans-

fer ticket, by reason whereof he was ejected by the conductor of the Court street line. It was held that this amendment was proper.

In *Salmon v. City Electric Ry. Co.*, 124 Ga. 1056, 53 S. E. 575, the original complaint charged negligence on the part of the railway company in placing certain poles too near the track. The amendment offered charged negligence on the part of the conductor in failing to warn the plaintiff of the proximity of the poles of the track. It was held error to refuse the amendment.

In *Smith v. Bogenschultz*, 19 S. W. 667, 20 S. W. 390, 14 Ky. Law Rep. 305, the original complaint charged that plaintiff's injury was caused by the jostling of a ladle containing molten iron, occasioned by the narrowness of the passageway through which the ladle had to be carried. The amendment charged that the injury resulted from the negligence of defendant in furnishing a defective ladle. It was held error to refuse the amendment.

In *City of Evanston v. Richards*, 224 Ill. 444, 79 N. E. 673, the original declaration pleaded negligence on the part of the city in permitting certain boards in a sidewalk to become loose, whereby plaintiff tripped and fell. The amendment charged negligence in permitting the sidewalk to remain in an unsafe condition, by reason whereof plaintiff stepped upon and broke through a defective board, thereby sustaining the injury. It was held proper to allow the amendment, and in the course of the opinion the court said: "In the case at bar the act or wrong charged was the disregard by the appellant of its duty to keep its sidewalk in safe repair, and in permitting it to be and remain in bad and unsafe repair and condition. In the original declaration the pleader stated the manner in which the condition complained of resulted in the injury to appellee. Upon the trial the proof tended to show the condition complained of was as alleged in the declaration, but that the manner of appellee's injury was not as alleged, but in the manner stated in the amendment. The act or wrong of appellant which resulted in the injury was the same in the original declaration as charged by the amended declaration; the mode or manner in which it resulted in the injury was stated differently."

The theory of all these cases is that, so long as the plaintiff adheres to the injury originally declared upon, he may

SECTION 5. RELATION OF AMENDED PLEADING TO ORIGINAL.

RAYMOND v. TOLEDO, ST. LOUIS AND KANSAS CITY RAILROAD COMPANY.

Supreme Court of Ohio. 1897.

57 Ohio State, 271.

SPEAR, J.: The question whether the cause was or not appealable depends upon whether the case in the court of common pleas was one in which a jury trial could of right have been demanded. This depends upon the character of the case which was actually tried. It is conceded that upon the original pleadings, and the issues made, as they stood prior to the filing of the amended and supplemental petition, June 3, 1895, the cause was one in equity, and triable to the court alone. It is contended by plaintiff in error that the nature of the action was not changed at any stage of the controversy, but remained an action to establish a boundary line. * * * And this leads to an inquiry respecting the effect upon the case made in the original pleadings by the filing of the amended and supplemental petition of June 3, 1895, and as to the case presented by that pleading.

That a plaintiff may substitute an amended petition in the place of the original, and change the form of action from an equitable action to a legal action, where the general identity of the transaction is maintained and the claim not substantially changed, admits of no question; nor is there doubt that, if such change is made, the court, in determining the issues to be tried, will look wholly to the amended pleadings, disregarding the original, and the cause will thereafter be treated as a suit at law solely, and will proceed to trial and judgment as though it had been commenced as a legal action.

The effect of the pleading filed June 3, 1895, upon the issues theretofore raised in the case, would not be conclusively determined by its title of "Amended and Supplemental Petition," nor by the expression, "For amended and supplemental petition herein," to be found in the first line, although such title and such statement should not be overlooked in ascertaining its effect; but if the

new pleading appears to have been filed not by way of addition merely to the original petition, and if it appears also to contain a full statement of the plaintiff's case, being on its face a statement of an entire cause of action, and in substance a substitute for the original, the filing of it by the plaintiff will be regarded as implying an abandonment by him of the case made in the original petition and any additions thereto, and as selecting this as the pleading on which he founds his suit, and the only petition which the court is to consider in determining the issues to be tried. Such, we think, is the scope of this pleading, as must be apparent to any legal mind on an inspection of it.

What, then, is the character of the case which this pleading makes?

* * * * * * * * * * *

* * * We have a case of a plaintiff out of possession making claim to title and possession of land, and praying a court to adjudge his title good and award him possession; in other words, praying to recover the land. All other relief sought is ancillary to this. It is relief which, if a proper case is made by the evidence, may follow, but cannot precede, judgment of possession. * * *

It results that the case tried in the court of common pleas was an action for the recovery of specific real property. Section 5130, Rev. St., requires that cause of this nature shall be tried by a jury, unless a jury trial be waived. In such action no right of appeal exists, for, under section 5226, the right to appeal is limited to actions in which the right to demand a jury did not exist; and the tacit waiver of the right to demand a jury, and submission to the court, cannot change the character of the action. That, as we have already found, is to be determined by the nature of the action itself. There was no error in dismissing the appeal.

Judgment affirmed.[1]

[1] *Original Pleading Still Available as Evidence.* "When an amended pleading is filed it supersedes and takes the place of the original pleading. Therefore the original pleading no longer exists *as a pleading in the cause.* It follows that not being a pleading in the cause on trial, any admissions it may contain are not conclusive as against the party filing the pleading, and it can only be treated as an admission in the case by introducing it in evidence. But it does not follow that the pleading, thus superseded, is not competent evidence. On the contrary it is competent in the cause in which it was filed, or any other action, not as a pleading, but as any other written

instrument containing an admission against interest, provided it be signed or acquiesced in by the party, or be signed and filed by an attorney having authority to bind him by statements so made." 1 Encyc. of Evidence, 437.

In *California* the contrary rule is held, and superseded pleadings are not admissible as evidence. Ralphs v. Hensler (1896), 114 Cal. 196.

MURPHY v. PLANKINTON BANK.

Supreme Court of South Dakota. 1904.

18 South Dakota, 317.

CORSON, P. J.: * * *

* * * * * * * * * * *

The second contention, that instead of an amended answer the amendment should have been by way of a supplemental answer, presents a question of some difficulty, in view of the provisions of section 154 of the Revised Code of Civil Procedure, as it was clearly stated in the defendants' application for leave to amend that the facts constituting the basis of the amended answer were unknown to the defendants at the time the former answer was filed. Section 154 of the Revised Code of Civil Procedure reads as follows: "The plaintiff and defendant respectively may be allowed, on motion, to make a supplemental complaint, answer, or reply, alleging facts material to the case, occurring after the former complaint, answer, or reply, or of which the party was ignorant when his former pleading was made." It will be noticed by this section that the defendant is allowed to make a supplemental answer alleging facts material to the case occurring after the former answer, or of which the party was ignorant when his former pleading was filed. The general rule is that no material fact which has occurred since the filing of the original plea can be introduced in an amended plea, and the party can avail himself of such fact only by filing a supplemental plea. But matter which existed at the time the plea was filed, but which was omitted by ignorance or mistake, is a proper subject for amendment. 1 Ency. P. & P. p. 471. The last clause of the section referred to seems to be in conflict with the general rule, and precisely what the lawmaking power intended by this sec-

tion is difficult to determine. This section was evidently copied from section 177 of the old code of New York, which was construed in the case of *Slauson v. Englehart*, 34 Barb. 198. In that case the Supreme Court of New York used the following language: "The supplemental answer provided for by section 177 of the code is undoubtedly, in one sense, a substitute for the former plea puis darrein continuance in actions at common law, as claimed by the plaintiff's counsel. But it is also in the same sense a substitute for the supplemental answer allowed under the former practice in suits in chancery. The general rule in actions at law was that the plea puis darrein was a waiver of all former pleas, and made the only issue to be tried in the action. This was not so, however, when the latter plea was not inconsistent with the former pleas. *Rayner v. Dyett*, 2 Wend. 30. In suits in chancery, on the contrary, a supplemental answer was never regarded as a waiver of the first answer. It was, as its name implied, an addition to the first answer, and, in substance and effect, an amendment to it. * * * The legislature, in allowing the supplemental complaint and answers, intended, I think, to follow the former chancery rule, and thus choose terms which import something additional or amendatory to what has gone before. This was substantially so decided by this court in *Dann v. Baker*, 12 How. Prac. 521." It would seem from that opinion that the supplemental answer referred to in the last clause of that section is in the nature of an amended rather than a supplemental answer, as that term is generally understood. In a similar section in the California code, the last clause of the section we are considering is omitted. Section 464, Code Civ. Proc. Cal. We are inclined to take the view that section 150. Rev. Code Civ. Proc. should be construed in connection with section 154, and that an answer in which it is sought to plead facts occurring prior to the filing of the original pleading should be by way of amendment, notwithstanding the facts may not have been known at the time to the party filing the original pleading, when it is sought to substitute a new pleading for the former pleading, and not as supplemental thereto, as explained by the court in *Slauson v. Englehart, supra*. This decision having been made before the section was adopted in this state, the interpretation of the

same is presumed to have been adopted with the section. In the case at bar, defendants, by their amended pleading, intended to supersede the former pleading and substitute the amended answer in place thereof. Taking this view of the section, we think the court committed no error in ruling that the form of the pleading was regular, and especially so in this case, as the appellant contends that it was shown that the defendants did have knowledge of all the facts at the time they filed their original answer.

* * * * * * * * * * *

BUSH v. PIONEER MINING COMPANY.

United States Circuit Court of Appeals. 1910.

102 Circuit Court of Appeals, 372.

Before GILBERT, Ross and MORROW, Circuit Judges.

GILBERT, Circuit Judge: Error is assigned to the rejection of the deposition of Alexander and of his deed to the plaintiff in error, made after the commencement of the action. In ejectment the plaintiff must recover, if at all, upon the state of his title as it subsisted at the time of the commencement of the action. Evidence of any after-acquired title is inadmissible, unless the foundation therefor has been laid by a supplemental complaint, under the authority of a statute which permits the filing thereof in actions at law. There is such authority in section 98, p. 164, Carter's Code Civ. Proc. Alaska, which provides that:

"The plaintiff and defendant respectively may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the case occurring after the former complaint, answer or reply."

The rule of practice under such statutes is similar to that of the chancery courts in reference to supplemental bills, and the supplemental complaint differs from an amended complaint in that it does not take the place of the original pleading, but stands with it and adds to it some fact which has occurred since the beginning of the action. That fact must be set forth in the supplemental complaint. If the fact be that the plaintiff in ejectment has, since the com-

mencement of the action, acquired a new or different title from that on which he brought his action, he must allege the fact, so that the defendant may be apprised of what he is required to meet. In *Musselman v. Manly*, 42 Ind. 462, the court said:

"A supplemental complaint is not, like an amended complaint, a substitute for the original complaint, by which the former complaint is superseded; but it is a further complaint, and assumes that the original complaint is to stand. A supplemental complaint must consist of facts which had arisen since the filing of the original complaint, * * * and must show upon its face that it is supplemental, and relates to matters which had occurred subsequent to the commencement of the action."

Cases in point are *Reily v. Lancaster*, 39 Cal. 354; *Roper v. McFadden*, 48 Cal. 346; *Taylor v. Gooch*, 110 N. C. 387, 15 S. E. 2; *Johnson v. Briscoe*, 92 Ind. 367; *Samuel Kahn v. Old Telegraph Mining Co.*, 2 Utah, 174; *Hardy v. Johnson*, 1 Wall. 371, 17 L. Ed. 502.

It is argued that the so-called amended complaint was in fact a supplemental complaint, sufficient to bring to the attention of the court and the opposite party notice of a fact which occurred subsequent to the commencement of the action, and that the language of the motion for leave to file it, in referring to facts occurring since the filing of the original complaint, advised the defendants that it was a supplemental complaint, upon which the plaintiff proposed to introduce evidence of the newly acquired title. We may concede that, while a supplemental complaint should properly be designated as such, nevertheless, under the liberal rules of code pleading, the name given to the pleading by the pleader may be disregarded, and its true nature may be determined by the allegations which it contains. But the question here is whether the allegations of the so-called amended complaint were such as to indicate that it was in fact a supplemental complaint, and that the plaintiff in the action intended to offer proof of a title acquired after its commencement. To this question there can be but one answer. There was no allegation that the plaintiff had or intended to rely on a title acquired since the commencement of the action. The allegation that the plaintiff claimed under locations made on and subsequent to August 1, 1900, "who thereafter conveyed to said plaintiff," was not a

statement of a fact occurring after the commencement of the action.

But it is contended that the defendants in error waived their right to question the amended complaint, or to deny that it was a supplemental complaint, by going to trial without demurring thereto, and authorities are cited to the proposition that where no cause of action is stated in the original complaint, and a supplemental complaint is filed for the purpose of setting up a cause which has subsequently arisen, and the defendant makes no objection to such supplemental complaint, but permits the cause to be heard on the merits, he waives all objection to the supplemental complaint based on the insufficiency of the original complaint. But the doctrine of those decisions is not involved. In this case the original complaint sufficiently and properly pleaded a cause of action in ejectment. The same may be said of the amended complaint. There was nothing, therefore, to be waived by the defendants by going to trial, as they did, without demurring to the second complaint, which apparently was intended to take the place of the first. The motion which they made to require the plaintiff to set forth more definitely the nature of his claim of title could have been denied by the court only upon the theory that the second complaint was in fact what it purported to be, and amended complaint. As an amended complaint, to stand in place of the original complaint, it contained all the averments essential to good pleading in ejectment; but as a supplemental complaint it was fatally defective in not specifying the facts which had arisen since the commencement of the action, and which made a supplemental complaint necessary.

The judgment is affirmed.

Affirmed.

SECTION 6. AIDER BY SUBSEQUENT PLEADING.

LUX AND TALBOT STONE COMPANY v. DONALDSON.

Supreme Court of Indiana. 1903.

162 Indiana, 481.

DOWLING, J.: Action to enforce the collection of a final assessment for the improvement of a street in the city of Logansport.

* * * * * * * * * * *

The complaint in this action wholly failed to allege that an ordinance for the improvement of the street was adopted by a two-thirds vote of the common council, or, indeed, that any such ordinance was passed at all. Neither did it contain an allegation of any matter of estoppel rendering appellees liable for the assessment. The adoption of the resolution declaring the necessity for the improvement by a two-thirds vote was alleged, and the other steps taken by the common council were sufficiently pleaded; but the indispensable jurisdictional fact that the common council, by the vote expressly required by the statute to authorize it to act at all, adopted an ordinance for the improvement of the street, is nowhere averred in the complaint. The adoption of such an ordinance with the concurrence of two-thirds of the members of the common council, where there is no petition, or some action equivalent thereto, is necessary, to give that body jurisdiction of the proceedings for the improvement of the particular street, and to subject the property abutting thereon to the payment of the cost of such improvement. Acts 1889, p. 241, c. 118, § 5; Burns' Rev. St. 1901, § 4292; *Moberry v. City of Jeffersonville,* 38 Ind. 198, 203; Elliott's Roads & Streets, §§ 545, 546. The omission of this averment is of such a vital character that, even upon a default, no judgment could have been rendered against the appellees.

But the appellees, by their 1st, 2d, 3d, 5th, 6th, 7th, and 8th paragraphs of answer, expressly admit that the improvement of the street was ordered by the common council. The admission that the council ordered the improvement

to be made is, in its necessary legal effect, an admission that such order was made in the manner and with the concurrence of the requisite number of the members of the council. This admission was effectual for all the purposes of the case, and not only cured the defect in the complaint, but it relieved the appellant from the necessity of offering any evidence to establish the fact so admitted. That other matters were pleaded by the appellees in avoidance of the confession so made does not alter the effect of the admission. The burden of proving them was assumed by the appellees. The letter and spirit of the civil code indicate that pleadings are to state the truth, and neither fiction nor falsehood is presumed to enter into them.

We are not called upon in this case to decide what effect a paragraph denying all the allegations of the complaint would have, when a fact was expressly admitted in other paragraphs of the answer.[1] Here the complaint contained no averment of the passage of an ordinance or other resolution causing the improvement to be made. The appellees voluntarily and expressly admitted, in seven separate paragraphs of their answer, that the improvement was made by the order of the council. The admission was in these words: "They admit the order of the council for the improvement of Sycamore street, without any petition of the property holders along the line of said street." This express admission cured the defect and omission in the complaint, and relieved the appellant from the necessity of averring or proving that such an order was made, or that it was passed by the vote required by the statute.

The effect of such admissions is thus stated in *Watkins v. Gregory*, 6 Blackf. 113, 115: "The declaration is objected to on the ground that it shows there was no valid consideration for the bond sued on, the consideration being a pre-existing debt. This objection is answered by a reference to the facts contained in the third plea. In showing the transaction to amount to a mortgage, the plea admits that there was a valid consideration for the bond. The defect in the declaration, therefore, though a substantial one, is cured by the express admissions of the plea."

[1] A party cannot take advantage of the allegations in his adversary's pleading as an aider to his own defective pleading, when he denies such allegations in a pleading subsequently filed. Sharkey Co. v. City of Portland (1911), 48 Ore. 353.

Again, in *Conner v. Beard*, 57 Ind. 15, the court said: "Two objections are taken to the cause of action: First, that it does not set out the names of the plaintiffs below. This is a fatal objection, if not cured; but it may be cured by the process, amendment, or by a pleading wherein the names are properly stated. In pleading to the cause of action, by an answer which stated the names of the plaintiffs in full, before Justice WELLS, the appellant cured this alleged error. *Widup v. Gibson*, 53 Ind. 484."

In *Wiles v. Lambert*, 66 Ind. 494, it was held that an insufficient description in the complaint of a judgment on which an execution was issued was cured by a proper description of the same in the answer. See, also, 1 Chitty on Pl. 710; *Miller v. James*, 86 Iowa, 242, 245, 53 N. W. 227; *Daub v. Englebach*, 109 Ill. 267, 271; *Parker v. Lanier*, 82 Ga. 216, 218, 8 S. E. 57; *New Albany Co. v. Stallcup*, 62 Ind. 345; *Colter v. Calloway*, 68 Ind. 219; *Holland v. Spell*, 144 Ind. 561, 42 N. E. 1014; Woolen's Civil Proc. § 1085; *Paige v. Willet*, 38 N. Y. 28; *White v. Smith*, 46 N. Y. 418. For a very full and exhaustive discussion of admissions in pleadings, see *Boots v. Canine*, 94 Ind. 408.[2]

* * * * * * * * * * *

[2] *Accord:* Iman v. Inkster (1912), 90 Neb. 704; Rogers v. Penobscot Mining Co. (1911), 26 S. D. 52; Thompson v. Jacoway (1911), 97 Ark. 508; Preiss v. St. Louis County (1910), 231 Mo. 332; Maysville v. Truex (1911), 235 Mo. 619; Storer v. Graham (1911), 43 Mont. 344; McConathy v. Deck (1905), 34 Colo. 232.

WHITLEY v. SOUTHERN RAILWAY COMPANY.

Supreme Court of North Carolina. 1896.

119 North Carolina, 724.

AVERY, J.: The court allowed a motion to dismiss, on the ground that the complaint contained only a statement of a defective cause of action. An answer had been filed, which was evidently framed upon the assumption that the plaintiff had properly set forth the material averment that he had been injured by the negligence of the defendant's servants, while on the premises of defendant, accompany-

ing a passenger, and therefore entitled to protection against negligence of servants. *Daniel v. Railroad Co.*, 117 N. C. 592, 23 S. E. 327. The defendant admits in the answer the contract of carriage, denies the allegation that the injury was caused by its negligence, and sets up by way of defense the plea of contributory negligence. If it were conceded that the statement of the cause of action was insufficient, such an answer would be held, by way of aider, to have cured any such defect, though the complaint might have been held bad pleading on demurrer. *Knowles v. Railroad Co.*, 102 N. C. 59, 9 S. E. 7. The answer shows that the defendant was not misled, but understood the cause of action to be the alleged injury received by a passenger through the neglect of its servants in charge of the train. The right to dismiss for defects of this kind grows out of the fundamental principle that a declaration or complaint must be sufficient to put the party sued upon notice of the nature of the claim, so as to enable him to intelligently prepare his defense. *Garrett v. Trotter*, 65 N. C. 430. But this and other rights, even though guaranteed by the organic law, may be waived by conduct inconsistent with the purpose to insist upon their enforcement, or by a failure, in the manner of asserting them, to observe a due regard for the rights of others. *Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427. The plaintiff has a right to demand a speedy trial upon putting the defendant on notice to prepare to meet his demand. The defendant demonstrates by the pleadings the fact that it understands the nature of the claim, which it has the right to controvert. There is therefore no reason why either should be surprised or injured by trying the issues raised by the pleadings. We must not be understood as deciding that the complaint was in fact defective; but it is sufficient for the disposition of this appeal to hold that, conceding its insufficiency, the defect was cured by the answer. The judgment is *reversed*.[1]

[1] A denial in a pleading of a material averment omitted from the adversary's prior pleading is usually held to cure such omission. Tarbell v. Tarbell (1910), 48 Colo. 71; Merryman v. Kirby (1910), 13 Cal. App. 344; Choctaw, Oklahoma & Gulf Rd. Co. v. Doughty (1905), 77 Ark. 1; Yellow Poplar Lumber Co. v. Ford (1910), 141 Ky. 5; McIntyre v. Federal Life Ins. Co. (1910), 142 Mo. App. 256.

Vanalstine v. Whelan (1901), 135 Cal. 232, holding that a mere denial is insufficient to cure the defect, is not in harmony with other California cases. Vance v. Anderson (1896), 113 Cal. 532.

CHAPTER XI.

CONSTRUCTION OF PLEADINGS.

SAGE v. CULVER.

Court of Appeals of New York. 1895.

147 New York, 241.

O'BRIEN, J.: While the complaint in this action is open to criticism as lacking in that clearness and fullness of statement essential to good pleading, yet we think that the decision of the general term overruling the defendants' demurrer was correct. When a complaint is met by a demurrer on the ground of insufficiency, the question always is whether, assuming every fact alleged to be true, enough has been well stated to constitute any cause of action whatever. The complaint will be deemed to be sufficient whenever the requisite allegations can be fairly gathered from all the averments, though the statement of them may be argumentative, and the pleading deficient in logical order and in technical language. The pleading will be held to state all facts that can be implied from the allegations by reasonable and fair intendment, and facts so impliedly averred are traversable in the same manner as though directly stated. *Vabriskie v. Smith*, 13 N. Y. 330; *Marie v. Garrison*, 83 N. Y. 14, 23; *Sanders v. Soutter*, 126 N. Y. 193.

The complaint in this case was not, we think, so deficient in the statement of facts as to warrant the defendants in assailing it by demurrer.

* * * * * * * * * * *

WITHAM v BLOOD

Supreme Court of Iowa. 1904.

124 Iowa, 695.

WEAVER, J.: The plaintiff's petition in equity states her claim substantially as follows: * * * To this petition

the trial court sustained a demurrer, and the plaintiff, electing to stand upon her pleading, has appealed.

* * * It was a maxim of the common law that everything in pleading is to be taken most strongly against the pleader. Gould's Pleadings (5th Ed.) § 169. This rule was based upon the very natural theory that every person states his case as favorably to himself as possible, and, moreover, that in stating his case for judicial consideration he is in duty bound to state it fully and unequivocally. The strictness of this rule has been much relaxed in courts where code systems have been enacted. But even under a code, while pleadings are to be liberally construed, and the pleader given the benefit of every allegation made or reasonably implied from the language employed, the principal at the base of the ancient rule, that the party is presumed to have stated his case as strongly as the facts will justify, still prevails. *Beadle v. R. R. Co.*, 48 Kan. 379, 29 Pac. 696; *Collins v. Townsend*, 58 Cal. 608; *Burkett v. Griffith*, 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151; *Rapier v. Paper Co.*, 64 Ala. 330; *Stevenson v. Flournoy*, 89 Ky. 561, 13 S. W. 210. In other words, nothing will be assumed in favor of the pleader which has not been averred, or may not, upon a liberal and fair interpretation, be implied from his averments. Abbott's Trial Brief, Pleadings, vol. 1, p. 100; *Cogswell v. Bull*, 39 Cal. 320; *Smith v. Buttner*, 90 Cal. 95, 27 Pac. 29; *Stone v. Young*, 4 Kan. 17; *Coolbaugh v. Roemer*, 30 Minn. 424, 15 N. W. 869; *Hoag v. Warden*, 37 Cal. 522; *Chamblin v. Blair*, 58 Ill. 385. The plaintiff in this case is attacking and asking to have canceled an apparently regular and legal title to land, and her petition, to entitle her to relief, must state facts, which, if admitted, will demonstrate the validity and superiority of her own title. As we have just seen, the law will assume nothing in her favor in addition to the matters which she has expressly or by fair and reasonable implication alleged; and if, when liberally and fairly construed, all the express and implied allegations of the petition may be admitted, and her title still be invalid, or the defendant's title may still be held unimpeached, then the pleading is insufficient, and a demurrer thereto will be

sustained. Tried by this test, we think the ruling of the trial court was correct.[1] * * *

* * * * * * * * * *

[1] There is much conflict in the language of the decisions in the code states on this subject of construction of pleadings on demurrer, and even the same court seldom adheres to an entirely consistent policy. In each case as it comes up the court attempts to do justice to the parties, and there seems to be little difference in the general results whether the rule announced calls for a liberal construction or, as is true in many code states, for a construction against the pleader. It is indeed, doubtful whether pleadings are construed very differently under the code than they are in states which still retain the common law form of pleading. The construction of pleadings is determined by the general liberal or technical attitude of the judiciary more than by statute, and that attitude is not very closely subject to legislative control.

PATTERSON v. PATTERSON.

Supreme Court of Oregon. 1902.

40 Oregon, 560.

Mr. Justice MOORE delivered the opinion:

This is an action to recover on a promissory note executed by the defendants, John Patterson and M. L. Chamberlin, to the Capital National Bank of Salem, Oregon, June 30, 1892, for the sum of $239.20, payable on demand, with interest at the rate of 10 per cent. per annum, and alleged to have been assigned by said bank to plaintiff, who claims to be the owner and holder thereof, and that no part of the same has been paid, except certain specified sums. The answer denies the material allegations of the complaint, and, for a separate defense, avers that the remainder due on said note was paid to the bank March 4, 1893. For a further defense, it is alleged that Chamberlin signed said note as surety only; that the defendant Patterson induced the plaintiff, who is his wife, to take up and pay off the note in question; that she well knew said note was given for her husband's debt; and that Chamberlin was only an accommodation maker. The answer contains other defenses, a statement of which is not necessary to the decision. The reply denies the allegations of new matter in the answer, and contains the following concession: "But plaintiff admits and avers that she did on said 4th day of

March, 1893, purchase said note, and pay the balance due thereon to the said Capital National Bank with her own funds, and took an assignment of the same." At the trial of the issues thus joined the jury found for plaintiff in the sum of $257.15, whereupon defendants' counsel moved the court for judgment on the pleadings, on the ground that plaintiff had admitted therein that said note had been fully paid by her to said bank, which motion having been sustained, the action was dismissed, and plaintiff appeals.

The question to be considered is whether the admission in the reply that plaintiff purchased the note and paid the remainder due thereon overcomes the allegation of the assignment of the instrument as stated in the complaint and reply, thereby defeating the right of action. It is argued by plaintiff's counsel that, the allegations of the reply not having been assailed by motion or challenged by demurrer, the verdict aided any defective statement in their pleadings, and, this being so, the court erred in setting aside the verdict and dismissing the action. Defendants' counsel insist, however, that the pleadings should be construed most strongly against the pleader, and, the plaintiff having admitted in the reply that she paid the note, the averment shows that the instrument was thereby discharged, and hence no error was committed as alleged.

The statute provides that in the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties.[1] Hill's Ann. Laws Or. § 84. In *Stewart v. Balderston*, 10 Kan. 131, under a similar statute (Comp. Laws Kan. 1879, p. 617, § 115), Mr. Justice VALENTINE, speaking for the court, in construing the allegations of a pleading, says: "But when the proper motions have been made to require the adverse party to so amend his defective pleading as to make it definite, certain, correct, and formal, thereby giving the adverse party notice wherein his pleading is defective, informal, or insufficient and where the adverse party then refuses to amend his defective pleading, resists the motions to have it amended, and has the motions overruled by the court, the most rigid rule of the common law should prevail. No statement of fact in the pleading which the motions reached should then be taken as true, un-

[1] This provision is found in practically all of the codes.

less well pleaded; and, if any such statement would bear different constructions, the party demurring should be allowed to adopt any one of such constructions which he should choose. The old rule of the common law that 'everything should be taken the more strongly against the party pleading,' although it can seldom have application under our code practice, should then prevail. After a party has received full notice that his pleading is defective in some particular, and has been asked to correct it, it is his fault if it still remains defective in such particular; and he is the one who should suffer on account of such defective pleading and not the other party.'' It has been held in this state that when the sufficiency of a pleading is challenged by motion or demurrer, and the action of the court in passing upon the objection thus interposed is not waived by answering over, the allegations of the complaint, answer, or reply thus assailed are to be construed most strictly against the pleader. *Pursel v. Deal,* 16 Or. 295, 18 Pac. 461; *Kohn v. Hinshaw,* 17 Or. 308, 20 Pac. 629. A different conclusion, however, seems to have been reached in *Jackson v. Jackson,* 17 Or. 110, 19 Pac. 847. Whatever the rule may be in respect to the interpretation of a pleading when assailed by motion or demurrer, and the action of the court in deciding the issue of law thus involved has not been waived by the defeated party, it is settled in this state, by repeated adjudications upon the subject, that if the sufficiency of a pleading has not been challenged in the manner indicated, but is drawn in question upon the admission of evidence, a liberal construction of the allegations of fact will be adopted. * * * No objection having been taken to the reply, its allegations will be liberally construed, for the purpose of determining its effect, with a view of substantial justice between the parties; and the allegations of the complaint and of the reply, not being repugnant, will be construed in *pari materia,* for the purpose of ascertaining the intent of the pleader. * * *

Observing these rules of interpretation, we think it reasonably inferable from plaintiff's pleadings that she intended to state that, in consideration of the payment of the remainder due on the note, it was assigned to her by the bank, and that she was the owner and holder thereof.

If it be assumed, however, that the averment of payment of the note by the plaintiff, as alleged in the reply, is a defective statement of the facts constituting the cause of

action, the rule is well settled in this state that, where no objection by motion or demurrer is made to the sufficiency of a pleading, every reasonable inference will be invoked and every legitimate intendment indulged in its aid when supported by a verdict. Thus, in *Miller v. Hirschberg*, 27 Or. 522, 40 Pac. 506, Mr. Chief Justice BEAN, speaking upon this subject, says: "No objection was made to the sufficiency of the reply by demurrer or otherwise, and we think it comes too late when made for the first time by motion for judgment notwithstanding the findings of the referee. It avers that the settlement alleged in the answer did not include the claim upon which this action is founded, or any part thereof, or have any reference thereto; and while it may have been defective in not setting forth fully the fraud, error, or mistake relied upon to surcharge or falsify the settlement, we are not trying the question on demurrer, but considering the sufficiency of the pleading after verdict. In such case it is entitled to the benefit of every reasonable inference and intendment in support of the judgment, and will not be held insufficient for a mere defective statement." In *Houghton v. Beck*, 9 Or. 325, it was held that a defect in a pleading, whether of substance or form, which would have been fatal on demurrer, is cured by verdict, if the issue joined be such as necessarily required, on the trial, proof of the facts defectively stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or that the jury would have given, the verdict. The rule is settled in this state that, while a verdict will never supply the omission of a material averment, it will aid informal defects in the pleading that do not go to the gist of the action. * * *

If it be assumed that there was a defect in the statement of facts in the reply, no objection thereto having been taken, the verdict necessarily cured it, and hence the act of the court in setting aside the verdict and dismissing the action must be held erroneous.

It follows from these considerations that the judgment is reversed, and the cause remanded for such further proceedings as may be necessary, not inconsistent with this opinion.

NATIONAL FIRE INSURANCE COMPANY v. EASTERN BUILDING AND LOAN ASSOCIATION.

Supreme Court of Nebraska. 1902.

63 Nebraska, 698.

ALBERT, C.: * * *

It is first urged that the court erred in overruling defendant's demurrer *ore tenus*. This demurrer was interposed after both parties had rested. The petition is long, and, as the case must be reversed, we think, on other grounds, it would serve no useful purpose to set out the petition at length in this opinion. It will suffice, perhaps, to say that had the demurrer been interposed before the introduction of any testimony, or before the parties had developed their respective theories of the case, it should have been sustained. But coming, as it did, at the close of the testimony, we cannot ignore the construction placed upon the petition by the parties to the suit, as evidenced by the answer and the nature of the evidence introduced. Interposed at so late a day, the pleading assailed should be scanned in the light of the entire record, and the court should give it such construction as the parties themselves have seen fit to place upon it, although, standing alone, it might not admit of such construction. Viewed in that light, the demurrer, in our opinion, was properly overruled.

* * * * * * * * * * *

TREANOR v. HOUGHTON.

Supreme Court of California. 1894.

103 California, 53.

SEARLS, C.: This is an action by a street contractor to recover $132.80 assessed upon the lot of defendants for its pro rata of the cost of improving Julian street, in the city of San Jose, under proceedings had by virtue of the act of March 18, 1885 (St. 1885, p. 147).

* * * * * * * * * * *

The whole question on this appeal, relates to the sufficiency of the complaint, in stating facts sufficient to constitute a cause of action.

* * * * * * * * * * *

There was no demurrer or other objection interposed to the complaint, and the objections to its sufficiency are urged here for the first time. The cause was tried by the court, and the findings are full and explicit upon all the material issues, and no objections are made thereto. Hence, it follows that all errors and omissions which are cured by verdict are waived.

* * * It is objected that the complaint fails to allege that the contract fixed the time for the commencement and completion of the work, which it is claimed, is fatal to the validity of the complaint.

* * * The contracts were awarded August 13, 1888, and entered into August 25, 1888,—less than 15 days after the award. The complaint does not, in express terms, aver the time specified in the contract for the commencement and completion of the work under the contract. It avers that all the work ordered to be done under the resolution "was and has been completed pursuant to said contracts and said plans and specifications, *within the time given by said commissioner of streets in said contracts,* with materials complying with the specifications, * * * under the direction and to the satisfaction of said commissioner of streets, and was and has been duly accepted by him." Beyond this quotation, I find no averment in the complaint referring to the matter under consideration.

* * * That the omission in the complaint would have been fatal, in the face of a special demurrer, is settled by the cases quoted *supra,* and by many others to which we might refer. The question, however, is, can appellant, after verdict, raise the question here for the first time?

Chitty, in his work on Pleading (at page 705 of volume 1) lays down the rule as follows: "The second mode by which defects in pleading may be, in some cases, aided, *is by intendment after verdict.* The doctrine upon this subject is founded upon the *common law,* and is independent of any statutory enactments. The general principle upon which it depends appears to be that where there is any defect, imperfection, or omission in any pleading, whether in *substance* or *form,* which would have been a fatal objection

upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is *cured by verdict.*

"The expression, *'cured by verdict,'* signifies that the court will, after a verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted in the pleadings was duly proven at the trial."

The difficulty experienced, in many cases of this character, is to determine whether or not the omitted fact or facts were proven at the trial. In the present instance, we are met with no difficulty of this character. The cause having been tried by the court, and facts found, it appears affirmatively by the record that what was omitted in the complaint was supplied without objection at the trial.

The defective statement of the complaint, wherein it was averred that the work and improvements were completed pursuant to the contracts, "within the time given by said commissioner of streets in said contracts," was but an inferential statement that the contracts specified the time within which the work was to be done, but was, in the language of the common law, an allegation that is *"holpen by verdict."*

The defendant having gone to trial upon such imperfect statement without objection, and it having been cured by the findings, which we must suppose were supported by testimony, he cannot now successfully raise the question of the sufficiency of the complaint in that respect.

* * * * * * * * * * *

Table of Cases

	Page
Abbott v. Meinken (1900) 48 N. Y. App. Div. 109	696
Adams v. Schwartz (1910) 137 N. Y. App. Div. 230	478
A. L. Clark Lumber Co. v. Johns (1911) 98 Ark. 211	341
Anderson v. Minneapoils, St. P. & S. Ste. M. Ry. Co. (1908) 103 Minn. 224	332
Astin v. Chicago, Milwaukee & St. Paul Ry. Co. (1910) 143 Wis. 477	239
Babcock v. Maxwell (1898) 21 Mont. 507	476
Baldwin v. City of Aberdeen (1909) 23 S. D. 636	574
Banta v. Siller (1898) 121 Cal. 414	436
Barker v. Wheeler (1901) 62 Neb. 150	407
Baxter v. O'Donnell (1897) 154 N. Y. 432	571
Baxter v. St. Louis Transit Co. (1906) 198 Mo. 1	390
Beakey v. Vander Meerschen (1908) 78 Kan. 538	645
Bean v. Lamprey (1901) 82 Minn. 320	410
Belden v. Wilkinson (1899) 44 N. Y. App. Div. 420	591
Blair v. Wilkeson Coal & Coke Co. (1909) 54 Wash. 334	670
Blemel v. Shattuck (1892) 133 Ind. 498	657
Board of Commissioners v. Am. Loan & Trust Co. (1899) 75 Minn. 489	689
Bowen v. Emerson (1869) 3 Ore. 452	264
Bowers v. Good (1909) 52 Wash. 384	704
Box v. Chicago, Rock Island & Pacific Ry Co. (1899) 107 Iowa, 660	247
Brown v. Baker (1901) 39 Ore. 66	640
Brown v. Leigh (1872) 49 N. Y. 78	705
Brown v. Rea (1907) 150 Cal. 171	291
Browning, King & Co. v. Terwiliger (1911) 144 N. Y. App. Div. 516	369
Bush v. Pioneer Mining Co. (1910) 102 C. C. A. 372	741
Calif. Safe Dep. & Trust Co. v. Sierra Valleys Ry. Co. (1910) 158 Cal. 690	582
Callahan v. Louisville Dry Goods Co. (1910) 140 Ky. 712	572
Callahan Co. v. Wall Rice Milling Co. (1909) 44 Ind. App. 372	457
Cartwright v. Ruffin (1908) 43 Colo. 377	735
Caruso v. Brown (1911) 142 Ky. 76	448
Carver v. Carver (1884) 97 Ind. 497	621
Casey v. Dorr (1910) 94 Ark. 433	668
Castle v. Madison (1902) 113 Wis. 346	132
Cate v. Gilman (1875) 41 Iowa, 530	660
Cave v. Gill (1900) 59 S. C. 256	351
Chicago & Erie Rd. Co. v. Lain (1908) 170 Ind. 84	270
Church v. Hendrie etc. Supply Co. (1910) 47 Colo. 544	385
Cincinnati Traction Co. v. Forrest (1905) 73 Ohio St. 1	417
Clark v. Oregon Short Line R. R. Co. (1908) 38 Mont. 177	721
Clay County Land Co. v. Alcox (1902) 88 Minn. 4	148
Coddington v. Canaday (1901) 157 Ind. 243	595
Colorado Springs Co. v. Wight (1908) 44 Colo. 179	281
Columbia Nat. Bank v. Western Iron & Steel Co. (1896) 14 Wash. 162	427
Commonwealth Co. v. Nunn (1902) 17 Colo. App. 117	672
Conrad Nat. Bank v. Great Nor. Ry. Co. (1900) 24 Mont. 178	266
Considerant v. Brisbane (1860) 22 N. Y. 389	61
Cooper v. Am. Cent. Ins. Co. (1909) 139 Mo. App. 570	378
Cornell v. Haight (1910) 87 Neb. 508	671

	Page
Cousar v. Heath, Witherspoon & Co. (1908) 80 S. C. 466	74
Cox v. Maddux (1880) 72 Ind. 206	113
Crane v. Powell (1983) 139 N. Y. 379	411
Culp v. Steere (1892) 47 Kan. 746	732
Curnow v. Phoenix Ins. Co. (1895) 46 S. C. 79	382
Darknell v. Coeur D'Alene & St. Joe Transp. Co. (1910) 18 Idaho, 61	676
Dewey v. Hoag (1853) 15 Barb. (N. Y.) 365	541
Disbrow v. Creamery Package Mfg. Co. (1908) 104 Minn. 17	139
Downey v. Colo. Fuel & Iron Co. (1910) 48 Colo. 27	560
Dudley v. Duval (1902) 29 Wash. 528	690
Duff v. Willamette Steel Works (1904) 45 Ore. 479	399
East v. Peden (1886) 108 Ind. 92	537
East St. Louis Ice Co. v. Kuhlmann (1911) 238 Mo. 685	589
Emison v. Owyhee Ditch Co. (1900) 37 Ore. 577	337
Enos v. Sanger (1897) 96 Wis. 150	56
Ewing v. Vernon County (1908) 216 Mo. 681	656
Fegelson v. Niagara Ins. Co. (1905) 94 Minn. 486	224
First Nat. Bank v. Hummel (1890) 14 Colo. 259	99
First Nat. Bank v. Lang (1905) 94 Minn. 261	664
First Nat. Bank of Cadiz v. Beebe (1900) 62 Ohio St. 41	163
Fidelity & Deposit Co. v. Parkinson (1903) 68 Neb. 319	552
Fitger Brewing Co. v. Am. Bonding Co. (1911) 115 Minn. 78	584
Flaherty v. Butte Elec. Ry. Co. (1911) 43 Mont. 141	718
Fledderman v. St. Louis Transit Co. (1908) 134 Mo. App. 199	343
Fortmeyer v. Nat. Biscuit Co. (1911) 116 Minn. 158	120
Frederick v. Koons (1907) 40 Ind. App. 421	620
Fritz v. Barnes (1877) 6 Neb. 435	667
Fuller v. Ill. Cent. Rd. Co. (1910) 138 Ky. 42	276
Fulton County Gas & Elec. Co. v. Hudson River Teleph. Co. (1911) 200 N. Y. 287	577
Gardner v. Samuels (1897) 116 Cal. 84	610
Gates v. Paul (1903) 117 Wis. 170	708
General Electric Co. v. Williams (1898) 123 N. C. 51	461, 498
George v. Benjamin (1898) 100 Wis. 622	90
Giselman v. Starr (1895) 106 Cal. 651	59
Gray v. Rothchild (1888) 48 Hun (N. Y.) 596	79
Greene v. McAuley (1905) 70 Kan. 601	42
Griffith v. Wright (1899) 21 Wash. 494	414
Grimes v. Cullison (1895) 3 Okla. 268	669
Grimm v. Town of Washburn (1898) 100 Wis. 229	384
Guidery v. Green (1892) 95 Cal. 630	716
Hahl v. Sugo (1901) 169 N. Y. 109	186
Hall v. Bell (1910) 143 Wis. 296	559
Hall v. Cudahy (1909) 46 Colo. 324	230
Hanson v. Neal (1908) 215 Mo. 256	543
Hartford Life & Annuity Ins. Co. v. Cummings (1897) 50 Neb. 236	157
Hart-Parr Co. v. Keeth (1911) 62 Wash. 464	450
Harvey v. Southern Pacific Co. (1905) 46 Ore. 505	236
Hasberg v. Moses (1903) 81 N. Y. App. Div. 199	334
Hawk v. Thorn (1869) 54 Barb. (N. Y.) 164	198
Hayward v. Goldsbury (1884) 63 Iowa, 436	667
Heaton v. Packer (1909) 131 N. Y. App. Div. 812	565
Heiden v. Atlantic Coast Line R. R. Co. (1909) 84 S. C. 117	699
Helena Nat. Bank v. Rocky Mountain Teleg. Co. (1897) 20 Mont. 379	306
Helm & Son v. Briley (1906) 17 Okla. 314	548
Henderson v. Johns (1889) 13 Colo. 280	549
Hill Brick & Tile Co. v. Gibson (1908) 43 Colo. 104	636
Home Ins. Co. v. Overturf (1904) 35 Ind. App. 361	701

	Page
Howard Iron Works v. Buffalo Elevating Co. (1903) 176 N. Y. 1	500
Howe v. Coates (1903) 90 Minn. 508	618
Jacoby v. James (1910) 136 N. Y. App. Div. 431	416
Jaeger v. Sunde (1897) 70 Minn. 356	614
Jansen v. Dolan (1911) 157 Mo. App. 32	490
Jefferson v. Asch (1893) 53 Minn. 446	50
Jeffries v. Fraternal Bankers' Reserve Society (1907) 135 Iowa, 284	556
Johnson v. State Bank of Seneca (1898) 59 Kan. 250	639
Jones v. City of Caldwell (1911) 20 Idaho, 5	368
Jones v. El Reno Mill & Elevator Co. (1910) 26 Okla. 796	405
Jones v. Whitaker (1911) 141 Ky. 484	445
Jones v. Witousek & Co. (1901) 114 Iowa, 14	508
Joseph v. Holt (1869) 37 Cal. 250	308
Kansas City v. Hart (1899) 60 Kan. 684	727
Kidder v. Port Henry Iron Ore Co. (1911) 201 N. Y. 445	309
Kleinclaus v. Dutard (1905) 147 Cal. 245	585
Kollock v. Scribner (1897) 98 Wis. 104	529
Kruschke v. Quatsoe (1910) 49 Colo. 312	216
Kucera v. Kucera (1893) 86 Wis. 416	607
Kurtz v. Ogden Canyon Sanitarium Co. (1910) 37 Utah, 313	617
Lassiter v. Roper (1894) 114 N. C. 17	319
Leary v. Moran (1886) 106 Ind. 560	380
Le Breton v. Stanley Contracting Co. (1911) 15 Cal. App. 429	677
Lent v. New York & Massachusetts Ry. Co. (1892) 130 N. Y. 504	260
Leyden v. Owen (1910) 150 Mo. App. 102	122
Libby v. St. Louis, Iron Mt. & So. Ry. Co. (1909) 137 Mo. App. 276	420
Logansport v. Kihm (1902) 159 Ind. 68	278
Long v. Dufur (1911) 58 Ore. 162	318
Los Angeles Ry. Co. v. Davis (1905) 146 Cal. 179	597
Loustalot v. Calkins (1898) 120 Cal. 688	115
Loveland v. Jenkins-Boys Co. (1908) 49 Wash. 369	442
Lux & Talbot Stone Co. v. Donaldson (1903) 162 Ind. 481	744
McArthur v. Moffett (1910) 143 Wis. 564	199
McCall Co. v. Stone (1905) 124 Wis. 572	551
McCaughey v. Schuette (1897) 117 Cal. 223	323
McIntosh v. Zaring (1897) 150 Ind. 301	84
McKenzie v. L'Amoureux (1851) 11 Barb. (N. Y.) 516	101
McKim v. District Court (1910) 33 Nev. 44	459
Malott v. Sample (1904) 164 Ind. 645	328
Mallinckrodt Chemical Works v. Nemnich (1902) 169 Mo. 388	566
Manley v. Park (1904) 68 Kan. 400	36
Merchants' Nat. Bank v. Barlow (1900) 79 Minn. 234	647
Merrill v. Suffa (1908) 42 Colo. 195	220
Millard v. Miller (1907) 39 Colo. 103	117
Milwaukee v. U. S. Fidelity & Guaranty Co. (1911) 144 Wis. 603	78
Minnich v. Packard (1908) 42 Ind. App. 371	546
Minor v. Baldridge (1898) 123 Cal. 187	267
Mitchell v. St. Mary (1897) 148 Ind. 111	69
Moody v. Ins. Co. (1894) 52 Ohio St. 12	257
Mueller v. Light (1909) 92 Ark. 522	581
Multnomah County v. Williamette Towing Co. (1907) 49 Ore. 204	402
Murphy v. Plankinton Bank (1904) 18 S. D. 317	739
Murray v. City of Butte (1906) 35 Mont. 161	233
Nahte v. Hansen (1908) 106 Minn. 365	218
Nat. Fire Ins. Co. v. Eastern Bldg. & Loan Assn. (1902) 63 Neb. 698	754
Nat. Fire Ins. Co. v. McKay (1860) 21 N. Y. 191	473
Needham v. Wright (1895) 140 Ind. 190	455
Nichols v. Nichols (1896) 134 Mo. 187	325

	Page
Oates v. Union Pacific Ry Co. (1891) 104 Mo. 514	76
Page Woven Wire Fence Co. v. Joslin (1906) 38 Colo. 162	601
Paine v. British-Butte Min. Co. (1910) 41 Mont. 28	287
Patterson v. Patterson (1902) 40 Ore. 560	750
Payne v. New York, Susquehanna & Western Rd. Co. (1911) 201 N. Y. 436	178
Paulsen v. Modern Woodmen (1911) 21 N. D. 235	698
Pendleton v. Beyer (1896) 94 Wis. 31	526
Penn. Mut. Life Ins. Co. v. Ornauer (1907) 39 Colo. 498	425
People v. Beach (1911) 49 Colo. 516	314
People's Oil & Fertilizer Co. v. Charleston & Western Carolina Ry Co. 1909 83 S. C. 530	71
Peters v. McPherson (1911) 62 Wash. 496	371
Peterson v. Pantheon Lumber Co. (1911) 62 Wash. 189	593
Pope Mfg. Co. v. Charleston Cycle Co. (1898) 55 S. C. 528	496
Pratt, Hurst & Co. v. Tailer (1904) 99 N. Y. App. Div. 236	695
Prunty v. Consolidated Fuel & Light Co. (1910) 82 Kan. 541	377
Pugh v. Winona & St. Peter Rd. Co. (1882) 29 Minn. 390	674
Ramp v. Metropolitan St. Ry. Co. (1908) 133 Mo. App. 700	419
Rand v. Butte Elec. Ry. Co. (1909) 40 Mont. 398	624
Randall v. Johnstone (1910) 20 N. D. 493	615
Raymond v. Toledo, St. L. & K. C. R. R. Co. (1897) 57 Ohio St. 271	737
Reilly v. Sicilian Asphalt Paving Co. (1902) 170 N. Y. 40	174
Rice v. Rice (1886) 13 Ore. 337	561
Rice v. Van Why (1910) 49 Colo. 7	682
Rooker v. Bruce (1909) 45 Ind. App. 57	493
Royal Ins. Co. v. Schwing (1888) 87 Ky. 410	339
Rush v. Brown (1890) 101 Mo. 586	348
Sage v. Culver (1895) 147 N. Y. 241	748
St. Louis, I. M. & So. Ry. Co. v. Higgins (1884) 44 Ark. 293	627
St. Louis Nat. Bank v. Gay (1894) 101 Cal. 286	521
St. Paul Fire & Marine Ins. Co. v. Mountain Park Stock Farm Co. (1909) 23 Okla. 79	642
Schiffer v. City of Eau Claire (1881) 51 Wis. 385	94
Scroggin v. Johnstone (1895) 45 Neb. 714	714
Seamans v. Barentsen (1905) 180 N. Y. 333	586
Seattle Nat. Bank v. Carter (1895) 13 Wash. 281	438
Secor v. Sturgis (1858) 16 N. Y. 548	166
Shelton v. Conant (1894) 10 Wash. 193	469
Sinker v. Floyd (1885) 104 Ind. 291	588
Smith v. Allen (1901) 63 Neb. 74	388
Smith v. City of St. Paul (1896) 65 Minn. 295	155
Smith v. French (1906) 141 N. C. 1	505
Smith v. Smith (1903) 67 Kan. 841	347
Smith v. Smith (1897) 50 S. C. 54	296
Sorenson v. Townsend (1906) 77 Neb. 499	409
Southern Indiana Loan & Savings Institution v. Roberts (1908) 42 Ind. App. 653	254
Spiess' Adm'x v. Bartley (1908) 130 Ky. 277	637
Sprague v. New York & N. E. Rd. Co. (1896) 68 Conn. 345	570
Sprunt & Son v. Gordon (1911) 89 S. C. 426	553
Stadler v. First Nat. Bank of Helena (1898) 22 Mont. 190	511
State v. Arkansas Brick & Mfg. Co. (1911) 98 Ark. 125	463
State ex rel. v. Malheur County Court (1909) 54 Ore. 255	312
State ex rel. v. Cooley (1894) 58 Minn. 514	303
State Savings Bank v. Albertson (1909) 39 Mont. 414	423
Steenerson v. Waterbury (1893) 52 Minn. 211	454
Steinbach v. Prudential Ins. Co. (1902) 172 N. Y. 471	143
Stenson v. Elfmann (1910) 26 S. D. 134	628
Stephens v. Am. Fire Ins. Co. (1896) 14 Utah, 265	353

	Page
Sterling v. Smith (1893) 97 Cal. 343	633
Stewart v. Price (1902) 64 Kan. 191	25
Stewart v. Winner (1905) 71 Kan. 448	693
Stoner v. Swift (1904) 164 Ind. 652	470
Strook Plush Co. v. Talcott (1908) 129 N. Y. App. Div. 14	358
Sundberg v. Goar (1904) 92 Minn. 143	112
Swank v. Elwert (1910) 55 Ore. 487	659
Swift & Co. v. Wabash Rd. Co. (1910) 149 Mo. App. 526	37
Tate v. Rose (1909) 35 Utah, 229	629
Taylor v. Adair (1867) 22 Iowa, 279	151
Thelin v. Stewart (1893) 100 Cal. 372	192
Thomas v. Hatch (1881) 53 Wis. 296	715
Thomas v. Ray (1910) 48 Colo. 423	680
Thompson v. Halbert (1888) 109 N. Y. 329	434
Thompson v. Read (1909) 63 Misc. (N. Y.) 235	327
Tilton v. Beecher (1874) 59 N. Y. 176	685
Tittle v. Kennedy (1904) 71 S. C. 1	655
Tobin v. Portland Mills (1902) 41 Ore. 269	104
Toner v. Wagner (1901) 158 Ind. 447	579
Town of Waukon v. Strouse (1888) 74 Iowa, 457	662
Treanor v. Houghton (1894) 103 Cal. 53	754
Turner v. Hitchcock (1866) 20 Iowa, 310	116
Upton v. Kennedy (1893) 36 Neb. 66	662
Vachon v. Nichols-Chisholm Lumber Co. (1910) 111 Minn. 45	313
Vallancey v. Hunt (1910) 20 N. D. 579	429
Walker v. Am. Cent. Ins. Co. (1894) 143 N. Y. 167	466
Wallace v. Lewis (1890) 9 Mont. 399	650
Weber v. Dillon (1898) 7 Okla. 568	612
Weeks v. O'Brien (1898) 25 N. Y. App. Div. 206	494
Weeks v. O'Brien (1894) 141 N. Y. 199	253
Welles v. Colo. Nat. Life Assur. Co. (1911) 49 Colo. 508	387
Wendling Lumber Co. v. Glenwood Lumber Co. (1908) 153 Cal. 411	284
Western Union Tel. Co. v. Henley (1901) 157 Ind. 90	338
Wetzstein v. Boston & Mont. Consol. Copper etc., Co. (1903) 28 Mont. 451	602
Whitley v. Southern Ry. Co. (1896) 119 N. C. 724	746
Wiedeman v. Hedges (1901) 63 Neb. 103	394
Wild Rice Lumber Co. v. Benson (1911) 114 Minn. 92	487
Wilson v. Charleston & Savannah Ry. (1897) 51 S. C. 79	395
Wilson v. Louisville & Nashville Rd. Co. (1908) (Ky.) 112 S. W. 585	227
Witham v. Blood (1904) 124 Iowa, 695	748

STANDARD LAW SCHOOL CASE BOOKS

Administration and Government—Goodnow's Cases on Government and Administration, by Frank J. Goodnow, Eaton Professor of Administrative Law and Municipal Science in Columbia University. 1 volume $2.50 net.

Agency—Mechem's Cases on the Law of Agency, by Floyd R. Mechem, Professor of Law in the University of Chicago. 1 volume $3.00 net.

American Administrative Law—Goodnow's Cases on American Administrative Law Including Public Officers and Extraordinary Legal Remedies, by Frank J. Goodnow. 1 volume $6.00 net.

Appellate Practice—Sunderland's Cases on Appellate Practice, by Edson R. Sunderland, Professor in the University of Michigan Law School. $4.50 net.

Bailments and Carriers—Goddard's Cases on Bailments and Carriers, by Edwin C. Goddard, Professor of Law in the University of Michigan. 1 volume $3.75 net.

Code Pleading—Hinton's Cases Code Pleading Under Modern Codes, by Edwin W. Hinton, Professor of Law, University of Missouri. 1 volume $4.00 net.

Code Pleading—Sunderland's Cases on Code Pleading, by Edson R. Sunderland, Professor in the University of Michigan Law School. $4.50 net.

Commercial Law—Bay's Cases on Commercial Law

Common Law Pleading—Shipp and Daish's Cases on Common Law Pleading, by E. Richard Shipp and John B. Daish. 1 volume $2.50 net.

Common Law Pleading—Sunderland's Cases on Common Law Pleading, by Edson R. Sunderland, Professor in the University of Michigan Law School. $4.50 net.

Conflict of Laws, Cases. See International Law.

Constitutional Law—Boyd's Cases on American Constitutional Law, by C. E. Boyd. second edition by C. E. Boyd $3.00 net.

Criminal Law, Knowlton's Cases on Criminal Law, by Jerome C. Knowlton, Marshall Professor of Law in the University of Michigan. 1 volume $3.00 net.

Criminal Procedure—Sunderland's Cases on Criminal Procedure, by Edson R. Sunderland, Professor of Law in the University of Michigan Law School. $4.50 net.

Damages—Russell's Cases, by Isaac Franklin Russell, Professor of Law in New York University Law School. 1 volume $4.00 net.

Domestic Relations—Holbrook's Cases, by Evans Holbrook, Professor of Law in the University of Michigan.

Equity Pleading and Practice—Sunderland's Cases on Equity Pleading and Practice, by Edson R. Sunderland, Professor in the University of Michigan Law School. $4.50 net.

Equity Pleading and Practice—Thompson's Cases on Equity Pleading and Practice, by Bradley M. Thompson, Professor of Law in University of Michigan. $3.00 net.

Evidence—Sunderland's Cases on Evidence. By Edson R. Sunderland, Professor in the University of Michigan Law School. $4.50 net.

Extraordinary Legal Remedies—Goodnow's Cases on Officers, including Extraordinary Legal Remedies, by Frank J. Goodnow, of the Law Department of Columbia University. 1 volume $5.00 net.

International Law—Dwyer's Cases Private International Law, second ed., by John W. Dwyer, of the Law Department, University of Michigan. $4.00 net.

Negotiable Instruments, Bunker's Cases on Negotiable Instruments, by Robert E. Bunker, Professor of Law in the University of Michigan. 1 volume $4.00 net.

Officers—Goodnow's Cases on the Law of Officers, including Extraordinary Legal Remedies, by Frank J. Goodnow, of the Law Department of Columbia University. 1 volume $5.00 net.

Partnership—Mechem's Cases on Partnership, by Floyd R. Mechem. Second edition by Frank L. Sage, Professor of Law in the University of Michigan. 1 vol. $3.50 net.

Partnership—Enlarged Edition, Mechem's Cases, same as above with addition of Supplement. 1 volume, third edition, $4.50 net.

Procedure—Sunderland's Cases on Procedure 7 volumes $4.50 each (in preparation).

Property—Rood's Cases on Property, Second Edition, by John R. Rood, Professor of Law in the University of Michigan. 1 volume $3.75 net.

Suretyship—Wilson's Cases on Guaranty and Suretyship, by H. H. Wilson, of the Law Department of the University of Nebraska. 1 volume $4.00 net.

Trial Practice—Sunderland's Cases on Trial Practice, by Edson R. Sunderland of the Law Department of the University of Michigan. $4.50 net.

Taxation—Goodnow's Cases on Taxation, by Frank J. Goodnow of the Law Department of Columbia University. 1 volume $5.00 net.

Wills—Bates, Cases on Wills, by Henry M. Bates, Dean of the Law Department, University of Michigan. 1 volume.

CALLAGHAN & COMPANY

General Offices
401-409 E. Ohio Street

CHICAGO

Retail Store
68 W. Washington Street

LEADING LAW SCHOOL TEXT BOOKS

Agency—Bays. A handbook, by Alfred W. Bays, Professor of Law, Northwestern University School of Commerce. **$1.50** net.

Agency Outlines—Mechem Outlines of Agency, by Floyd R. Mechem. Professor of Law in the University of Chicago. Second Edition. **$2.00** net.

Agency—Mechem on Agency. A treatise by Floyd R. Mechem. **$5.00** net.

American Law—Andrews' American Law. Second Edition by J. D. Andrews. 2 vols. **$12.00.**
Same, 1 vol. ed., **$5.00** net.

Bailments and Carriers—Goddard's Outlines, by E. C. Goddard, Professor of Law in the University of Michigan. **$2.50** net.

Bailments and Carriers—Van Zile, by Philip T. Van Zile, Dean Detroit College of Law. Second Ed. **$5.00.**

Bankruptcy—Bays. A handbook on Debtor, Creditor and Bankruptcy, by A. W. Bays. **$1.50** net.

Blackstone's Commentaries—Cooley. 4th Edition Commentaries on the Laws of England by William Blackstone, with a translation of all foreign words and phrases appearing in the text and very full and copious notes by Thomas M. Cooley. Fourth Edition by J. D. Andrews. 2 volumes **$9.00** net.
Same, 3rd Edition **$6.00** net.

Business Law and Methods—By George L. Corlis, Dean Benton College of Law. 1 volume.

Carriers—Hutchinson. The Law of Carriers by Robert Hutchinson, Second Ed. by Floyd R. Mechem. **$4.00.**

Code Pleading—Phillips. Principles of Pleadings in Actions under the Codes of Civil Procedure by G. L. Phillips. **$4.00** net.

Commercial Law—Bays. American Commercial Law Series. 9 vols. **$12.00.** Separately per volume **$1.50.**

Commercial Law - Corlis. By George L. Corlis, Dean Benton College of Law. 1 volume.

Common Law Pleading—Andrews' Stephen's Pleadings. By Henry John Stephen. Second Edition by J. D. Andrews. **$3.50** net.

Contracts—Anson. Second American Edition, by Jerome C. Knowlton, Professor of Law in the University of Michigan. **$3.50** net.

Contracts—Bays. A handbook by A. W. Bays. **$1.50**

Contracts—Hammon. The General Principles of Contracts, by Louis L. Hammon. **$5.00** net.

Contracts—Willis. A treatise by Hugh E. Willis, Professor of Law, University of Minnesota Law School. **$3.00** net.

Corporations—Municipal - Elliott. Second Edition, by John E. Macy, Professor in Boston University Law School. **$4.00** net.

Corporations—Bays. A handbook by A. W. Bays. **$1.50**

Corporations—Marshall—[Private]. A treatise. Second Edition by William L. Marshall and William L Clark. **$5.00** net.

Corporations—Abbott [Public]. A treatise by Howard S. Abbott. 1 volume **$4.00.**

Criminal Law—Clark & Marshall—Crimes. Second Edition by Herschell B. Lazell. **$5.00** net.

Criminal Law and Procedure Outlines—Washburn. By Emery Washburn. Third Edition by Marshall D. Ewell. **$2.50** net.

Damages—Willis. A concise treatise by Hugh E. Willis, Professor of Law, University of Minnesota. **$3.00** net.

Dictionary—Cyclopedic Law Dictionary. $5.00 net.

Dictionary—Kinney's Dictionary and Glossary. $4.00.

Domestic Relations—Peck, by Epaphroditus Peck, of the Law Dept. of Yale University.

Domestic Relations—Long. A treatise by Joseph R. Long, Prosessor of Law in Washington and Lee University. $3 50 net.

Equity Pleading and Practice—Fletcher. Equity Pleading Practice and Forms, by William Meade Fletcher. **$5.00** net.

Equity Pleading and Practice—Van Zile, by Philip T Van Zile. **$5.00** net.

Evidence—Hammon. A treatise, by Louis L. Hammon **$5.00** net.

Evidence—Hughes. An illustrated treatise, by Thomas W. Hughes, Professor of Law in the University of Illinois **$4.00** net.

Evidence—Kennedy. A practical Codification by Richard Lee Kennedy. **$2.00** net.

Evidence—Reynolds Theory of Evidence, by William Reynolds. **$2.00** net.

Evidence—Revnolds. Trial Evidence and Cross Examination, pocket edition. Limp leather **$3.50** net.

Insurance—Bays. A handbook, by Alfred W. Bays **$1.50** net.

International Law—Bordwell's Laws of War. By W P. Bordwell, Professor of Law, University of Missouri. **$3.50** net.

International Law—Taylor. The Origin and Growth of International Public Law, by Hannis Taylor. **$5.50** net

Jurisprudence—Pattee. The Essential Nature of Law by W. S. Pattee, Dean Law Department, University of Minnesota. **$2.50** net.

Legal Ethics—Warvelle. A discussion of professional conduct by George W. Warvelle. **$1.50 net.**

Negotiable Instruments—Bays. A handbook, by Alfred W. Bays. **$1.50** net.

Negotiable Instruments—Bunker, by Robert E. Bunker, Professor of Law in the University of Michigan Law School. **$3.50.**

Negotiable Instruments—Ogden, by J. M. Ogden of the Indiana Law School. **$4.00.**

Negotiable Instruments—Selover. Second Edition by Wm. H. Oppenheimer. **$4.00 net.**

Partnership—Bays. A handbook, by A. W. Bays. **$1.50**

Partnership—Mechem. By Floyd R. Mechem. Second edition, **$2.50** net.

Partnership—Shumaker, by Walter A. Shumaker. Second edition. **$3.00** net.

Personal Property—Childs, by Frank Hall Childs, sometime Professor of Law in Chicago Kent College of Law. [In Preparation.]

Officers—Mechem. Public Offices and Officers, by Floyd R. Mechem. **$5.00** net.

Quizzers—Walsh. Students Quiz Books. 13 numbers Paper, each **50 cents.**

Real Property—Bays. A handbook by A. W. Bays. **$1.50** net.

Real Property—Tiffany, by Herbert T. Tiffany 2 volumes. **$10.00.**
Student's edition [2 volumes in 1] **$7.00** net.

Real Property—Warvelle. Elements, by George W Warvelle. Second edition. **$4.00** net.

Roman Law—Sandar's Justinian Institutes. First American Ed. by W. E. Hammond. **$5.00** net.

Sales—A handbook by Alfred W. Bays. **$1.50** net.

Suretyship—Spencer. A treatise on Suretyship and Guaranty, by Edward W. Spencer, Dean Milwaukee Law School.

Torts—Cooley. A new Law School Edition, by John Lewis. **$5.00** net.

Torts—Cooley's Elements, by Thomas M. Cooley. **$3.50** net.

Trusts—Pound, by Roscoe Pound, Professor of Law in Harvard University.

Wills—Rood. Including also Gifts Causa Mortis and a summary of the law of Descent, Distribution and Administration, by John R. Rood, Professor of Law University of Michigan. **$4.00** net.

CALLAGHAN & COMPANY

General Offices
401-409 E. Ohio Street

CHICAGO

Retail Store
68 W. Washington Street

BB 86V MLp
Cases on procedure, annotated
Stanford Law Library
3 6105 044 129 737
ITY LAW LIBRARY